Nos. 276 and 278.

In the Supreme Court of the United States,

OCTOBER TERM, 1906.

MAYER S. BERNHEIMER and LORIN S. BERNHEIMER, Surviving Executors of the Last Will and Testament of Simon Bernheimer, deceased,

Plaintiffs-in-Error,

vs.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,

Defendant-in-Error.

FILED.
MAR 23 1907
JAMES H. MCKENNEY
Clerk

MAX DREY, CHARLES D. BERNHEIMER, and MEYER A. BERNHEIMER, Executors of the Last Will and Testament of Isaac Bernheimer, deceased,

Plaintiffs-in-Error,

vs.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,

Defendant-in-Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for Plaintiffs-in-Error.

LAURENCE ARNOLD TANZER,
Of Counsel for Plaintiffs-in-Error.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

These cases come up on writs of error to review judgments rendered in favor of the defendant in error, who was plaintiff

in the court below (and will be referred to as plaintiff) upon a verdict directed by the court against the plaintiffs in error, who were defendants below (and will be referred to as defendants).

The actions were brought by the plaintiff, as receiver of the Minnesota Thresher Manufacturing Company, a Minnesota corporation, against the defendants, as executors of two deceased stockholders, to recover the amount of an assessment imposed by the District Court of Washington County, Minnesota, on the so-called stockholders' double liability.

The cases were tried on agreed facts. The only questions involved are questions of law, as to the constitutionality of the statute under which the assessment was levied, as to the jurisdiction of the Minnesota Court to make the assessment, and as to its enforceability by the plaintiff against the defendants in the court in which the actions were brought.

The Minnesota Thresher Manufacturing Company was organized in 1884, to take over the assets and conduct the business of the Northwestern Manufacturing and Car Company, which in turn was the successor of Seymour, Sabin & Co.

Seymour, Sabin & Co. was a corporation organized under the laws of the State of Minnesota in 1874, for the purpose of carrying on the business of general manufacturing, merchandising, and lumber. It had an extensive manufacturing establishment and plant at Stillwater, Washington County, Minnesota, where it manufactured threshing machines and other farm and agricultural machinery and implements. These it sold largely upon credit, taking in many cases in payment mortgages, farmers' notes, or other liens on the property sold (Record, p. 28).

This company in 1882 sold all its real estate, buildings, manufacturing property and plant, together with its bills and accounts receivable, to the Northwestern Manufacturing and Car Company, a corporation organized for the "manufacture, building, and sale of steam engines of all kinds, and the manufacture, building, and sale of passenger cars, freight cars, flat cars, cattle cars, and all other kinds of cars, and the fixtures and attachments thereto belonging, and the manufacture and sale of farm implements and machinery of all kinds, and the manufacture and sale of all articles, implements,

and machinery of which wood and iron form the principal component parts, and the manufacture of the materials therein used" (p. 29).

The Northwestern Manufacturing and Car Company, with the assets so acquired, continued the manufacturing business of Seymour, Sabin & Co., until it became financially embarrassed, and on May 10, 1884, a receiver of its property was appointed by the District Court of Washington County, Minnesota, who continued the business under the direction of the Court (p. 29).

A meeting of the creditors of the company was held November 25, 1884, at which a committee of creditors was appointed to prepare a plan of reorganization (p. 29).

The liabilities of the company amounted to $3,406,359.49, and the assets were valued at $4,372,778.75, made up as follows:

Cars and machines constructed and in process of construction and materials for same....	$1,535,887.70
Real estate and buildings.....	413,526.50
Machinery, tools and fixtures.....	127,489.60
Bills receivable, and accrued interest.....	1,524,007.48
Patents, patterns, teams, etc.....	99,483.06
Accounts receivable	672,384.41
	$4,372,778.75

(Pp. 38, 39.)

The creditors' committee reported that this valuation of the assets "was an eminently conservative valuation, if the business of the company should be continued, but if the company's affairs are to be closed up and the assets sold out for cash, the valuation made by the receiver would be much too high;" and that this condition existed not only as to the manufacturing plant, and the property used in connection therewith, which would obviously depreciate greatly upon a liquidation of the company's affairs, but extended also to the item of farmers' notes, with a face value of $1,780,000; that if the business were continued, and the company continued to furnish repair parts, ninety-five per cent. of this amount could be

collected; but if the company went out of business, it would be hard to collect notes given for machines which would be useless to the purchasers as soon as a cog-wheel or other part of the machine should wear out (pp. 29-31).

The committee therefore recommended a plan of reorganization whereby a new corporation should be organized to issue its preferred stock to the creditors of the old company for their claims at par; to issue its common stock in exchange, share for share, for the preferred stock of the old company; to purchase, at judicial sale in the receivership action, all the assets and good will of the old company as an entirety and as a going concern; and thereafter to continue the manufacturing business of the old company (pp. 31, 32). The committee, in its report, gave the creditors the assurance: "No individual liability attached to a subscription, and the stock when issued will be full paid and non-assessable" (p. 34).

Pursuant to these recommendations, the Minnesota Thresher Manufacturing Company was incorporated by the filing of its articles of association with the Secretary of State of Minnesota December 5, 1884 (p. 38). The articles of association state the intention of the incorporators to form a corporation under the statute of Minnesota, entitled, "An act relating to manufacturing corporations," approved March 7, 1873, and the objects for which the corporation was formed are stated as being "the purchase of the capital stock, evidences of indebtedness issued by it, and the assets of the Northwestern Manufacturing and Car Company, a corporation existing under the laws of the State of Minnesota, or any portion of said capital stock, evidences of indebtedness or assets, and the manufacture and sale of steam engines of all kinds, farm implements and machinery of all kinds, and the manufacture and sale of all articles, implements and machinery of which wood and iron or either of them form the principal component parts, and the manufacture of the materials therein used" (p. 35).

The new company proceeded to carry out the plan of reorganization by issuing its stock in exchange for claims against, and the preferred stock of the old company. Among the holders of preferred stock in the old company who exchanged their stock for common stock in the new company,

were Simon Bernheimer and Isaac Bernheimer, the defendants' testators, each of whom, by such exchange, became the owners of two hundred shares of the common stock of the new company, of the par value of fifty dollars each. These shares were issued March 28, 1885, and contained the statement that they were "full paid and non-assessable" (pp. 40, 72).

The new company consummated the plan of reorganization by purchasing, at the receiver's sale on October 27, 1887, the manufacturing property and plant of the old company, together with its bills receivable and other assets. On January 5, 1888, it received a conveyance of the property. In February, 1888, it took possession of the assets, and continued the manufacturing business formerly carried on by the old company. This business it carried on for upwards of twelve years, until December 14, 1900, when E. D. Buffington was appointed receiver (p. 40).

At the time of acquiring the property of the Northwestern Manufacturing and Car Company, on January 5, 1888, the Minnesota Thresher Manufacturing Company executed a trust mortgage to secure bonds issued by it. This mortgage covered all the real estate, property, assets and franchises of the company. The company becoming financially embarrassed, the trustee under the mortgage filed a bill to foreclose it in the United States Circuit Court for the District of Minnesota. That court on December 14, 1900, appointed E. D. Buffington receiver of all the property covered by the mortgage. The receiver qualified as such, took possession of the assets and property of the corporation, and carried on the business under the direction of the court, until the foreclosure sale. On May 25, 1901, all the property covered by the mortgage was sold under final decree of foreclosure and sale, and a conveyance of the entire property was on June 13, 1901, executed and delivered to the purchaser. The sale was confirmed on July 12, 1901, by decree of the court, and on September 4, 1901, the receiver was discharged, and he and his sureties released from obligation on his bond (pp. 72, 73).

The assessment here in suit was made in proceedings instituted after the foreclosure sale. Before inquiring into those proceedings, it may be well to examine the statute which

is claimed to authorize them, and the change in the law made by that statute, to which the defendants object as impairing rights guaranteed them by the Constitution of the United States.

The provisions of law relating to the double liability of stockholders at the time when the defendants acquired their stock were Section 3 of Article 10 of the Constitution of the State of Minnesota, which provides as follows:

> "Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him;"

and Chapter 76 of the General Statutes of Minnesota of the year 1878, as re-enacted in the General Statutes of 1894. The provisions of that Statute are as follows:

> "SECT. 5897. Whenever a judgment is obtained against any corporation incorporated under the laws of this State, and an execution issued thereon is returned unsatisfied in whole or in part, upon the complaint of the person obtaining such judgment, or his representatives, the District Court within the proper county may sequestrate the stock, property, things in action and effects of such corporation, and appoint a receiver of the same.
>
> SECT. 5905. Whenever any creditor of a corporation seeks to charge the directors, trustees or other superintending officers of such corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any district court which possesses jurisdiction to enforce such liability.
>
> SECT. 5906. The Court shall proceed thereon, as in other cases, and when necessary shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers.
>
> SECT. 5907. If, on the coming in of the answer or upon the taking of any such account, it appears that such corporation is insolvent, and that it has no property or effects to satisfy such creditors, the Court may proceed, without appointing any receiver, to ascertain the respective liabilities of such directors and stock-

holders, and enforce the same by its judgment, as in other cases.

SECT. 5908. Upon a final judgment in any such action to restrain a corporation or against directors or stockholders, the Court shall cause a just and fair distribution of the property of such corporation, and of the proceeds thereof to be made among its creditors.

SECT. 5909. In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts, the Court shall proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company.

SECT. 5910. If the debts of the company remain unsatisfied, the Court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment, as in other cases.

SECT. 5911. Whenever any action is brought against any corporation, its directors or other superintending officers or stockholders, according to the provisions of this chapter, the Court, whenever it appears necessary or proper, may order notice to be published in such a manner as it shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment."

These were, at the time when the defendants acquired their stock, the only provisions of law providing for or regulating the double liability of stockholders in Minnesota corporations, or relating to the enforcement of such liability (p. 41).

In April, 1899, many years after the defendants acquired their stock, the legislature of Minnesota enacted Chapter 272 of the General Laws of Minnesota for the year 1899, which is the act whose constitutionality is here called in question. That act is entitled "An act to provide for the better enforce-

ment of the liability of stockholders of corporations," and provides as follows:

SECTION 1. Whenever any corporation created or existing by or under the laws of the State of Minnesota, whose stockholders or any of them are liable to it or to its creditors, or for the benefit of its creditors, upon or on account of any liability for or upon or growing out of, or in respect to the stock or shares at any time held or owned by such stockholders, respectively, whether under or by virtue of the Constitution and laws of said State of Minnesota, or any statute of said State, or otherwise, has heretofore made or shall hereafter make any assignment for the benefit of its creditors under the insolvency laws of this State; or whenever a receiver for any such corporation has heretofore been or shall hereafter be appointed by any district court of this State, whether under or pursuant to any of the provisions of chapter seventy-six (76) of the General Statutes of eighteen hundred and ninety-four (1894) of Minnesota and the acts amendatory thereof, or under or pursuant to any other statute of this State or under the general equity powers and practice of such court; the district court appointing such receiver or having jurisdiction of the matter of said assignment may proceed as in this act provided.

SECTION 2. Upon the petition of the assignee or receiver of any such corporation, or of any creditor of such corporation who has filed his claim in such assignment or receivership proceedings, the said district court shall by order appoint a time for hearing not less than thirty (30) nor more than sixty (60) days from the time of filing said petition with the Clerk of said Court, and shall direct such notice of such hearing to be given by the party presenting said petition, by publication or otherwise, as the Court in its discretion may deem proper; but if said petition be filed by a creditor, other than the assignee or receiver of said corporation, the Court shall direct that notice of such hearing be personally served on such assignee or receiver.

SECTION 3. At such hearing the Court shall consider such proofs by affidavit or otherwise, as may then be offered by the assignee or receiver, or by any creditor or officer or stockholder of said corporation, who may appear in person or by attorney, as to the probable indebtedness of said corporation, and the expenses of said assignment or receivership, and the probable

amount of assets available for the payment of such indebtedness and expenses; and also as to what parties are or may be liable as stockholders of said corporation and the nature and extent of such liability. And if it appear to the satisfaction of the Court that the ordinary assets of said corporation, or such amount as may be realized therefrom within a reasonable time, will probably be insufficient to pay and discharge in full and without delay its indebtedness and the expenses of such assignment or receivership, and that it is necessary or proper that resort be had to such liability of its stockholders; the said Court shall thereupon by order direct and levy a ratable assessment upon all parties liable as stockholders, or upon or on account of any stock or shares of said corporation, for such amount, proportion or percentage of the liability upon or on account of each share of said stock as the Court in its discretion may deem proper (taking into account the probable solvency or insolvency of stockholders and the probable expenses of collecting the assessment); and shall direct the payment of the amount so assessed against each share of said stock to the assignee or receiver within such time thereafter as said Court may specify in said order.

SECTION 4. Said order shall direct the assignee or receiver to proceed to collect the amount so assessed against each share of said stock from the parties liable therefor; and shall direct and authorize said assignee or receiver, in case of the failure of any party liable upon or on account of any share or shares of said stock to so pay the amount so assessed against the same within the time specified in said order, to prosecute actions against each and every such party so failing to pay the same, wherever such party may be found, whether in this State or elsewhere.

SECTION 5. Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, whether appearing or represented at said hearing, or having notice thereof or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment. This provision shall also apply to any subsequent assessment levied by said Court, as hereinafter provided.

SECTION 6. It shall be the duty of such assignee or receiver to, and he may, immediately after the expiration of the time specified in said order for the payment

of the amount so assessed by the parties liable therefor, institute and maintain an action or actions against any and every party liable upon or on account of any share or shares of said stock who has failed to pay the amount so assessed against the same, for the amount for which such party is so liable. Said actions may be maintained against each stockholder, severally, in this State, or in any other State or country where such stockholder, or any property subject to attachment, garnishment or other process in an action against such stockholder may be found. But if said assignee or receiver shall in good faith believe any stockholder so liable to be insolvent, or that the expense of prosecuting such action against such stockholder will be so great that it will be of disadvantage to the estate and the interest of creditors to prosecute the same, said assignee or receiver shall so report to said Court; and shall not be required to institute or prosecute any such action unless specifically directed so to do by said Court. And in such case said Court shall not require said Receiver to institute or maintain such action unless said Court shall have reasonable cause to believe that the result of such action will be of advantage to the estate and creditors of said corporation, except as hereinafter provided.

SECTION 7. In any case where the Court shall have levied an assessment against stockholders as in this act provided, for a less amount or proportion than the full amount of the liability upon or on account of the stock of said corporation, and it shall thereafter be made to appear to the satisfaction of said Court by petition or otherwise, and upon hearing as hereinbefore provided, that by reason of the insolvency of stockholders, or for any other cause, it is necessary or desirable or for the interest of creditors that another and further assessment upon or against said stock be levied, the Court shall by order direct and levy a further and additional assessment for such amount, proportion or percentage of the liability upon or on account of each share of said stock, as said Court in its discretion may deem proper, and in the same manner may levy further and additional assessment upon said stockholders, and against said stock, not exceeding in the aggregate, the maximum of liability upon or on account of the stock of said corporation.

SECTION 8. All the provisions of this act shall apply to any such assessment levied by said Court after the

first, and to the proceedings preliminary to levying and directing the same, to the same extent and with the same force and effect as to the first assessment so levied under the provisions of this act.

SECTION 9. Where two (2) or more such assessments are levied or directed, the assignee or receiver may join the causes of action accruing against any stockholder upon any two or more such assessments in a single action against such stockholder or he may, at his discretion, unless otherwise directed by the Court, maintain a separate action against each stockholder for each successive assessment levied or directed.

SECTION 10. If said assignee or receiver shall fail to institute and prosecute an action against any stockholder who has failed to pay any such assessment or assessments, or to prosecute such an action with diligence after instituting the same, any stockholder or stockholders who have paid in full the amount of any such assessments, or any creditor or creditors of said corporation, may petition said Court to require said assignee or receiver to prosecute such action against such stockholders so failing to pay as aforesaid, or to permit the party or parties so petitioning to institute and maintain, or to continue the prosecution of such action in the name of said assignee or receiver, and for the benefit of said estate, and if said party or parties so petitioning shall furnish security or indemnity for costs and expenses as the Court may direct, the said Court shall thereupon require said assignee or receiver to forthwith prosecute such action, or in its discretion may permit such party or parties so petitioning to institute and prosecute or continue the prosecution of the same as aforesaid.

SECTION 11. If, after the payment of all the expenses of such assignment or receivership, and all indebtedness of and claims against said corporation proved or allowed in said proceedings, there shall remain any surplus money or property in the hands of the assignee or receiver, the same shall be distributed under the direction of said Court, and in such a manner as may be just and equitable, among those stockholders who have paid the assessments levied against their stock as herein provided. And any stockholder who has so paid such assessments levied against his stock shall, in addition to any remedy herein provided for, be entitled to enforce contribution from stockholders who have not paid such assessments, and for that purpose may be

subrogated to the rights of the creditors of said corporation against such defaulting stockholders, in such manner and to such extent as may be just and equitable.

SECTION 12. Whenever, in a proceeding heretofore instituted under the then existing laws of this State to enforce the liability of stockholders of any such corporation, a portion of the amount for which the stockholders of such corporation are liable has been collected, but the amount so collected is insufficient to pay and discharge claims against said corporation in full, and there remain stockholders who were not made parties to such proceedings, then, notwithstanding final judgment may have been rendered and entered in said proceeding against those stockholders who were made parties thereto, the District Court having jurisdiction may proceed as in this act provided and may levy assessments in the manner herein prescribed to such extent as may be necessary to satisfy and discharge in full all claims against said corporation and all expenses of such proceedings. And the assignee, or receiver, or the receiver appointed by said Court in such proceeding, may institute and maintain actions to recover the amount of such assessments in the same manner, with the same effect, as in the case of an assessment levied as provided in the preceding sections of this act, and all the provisions of this act shall apply to any stockholder who has paid, or from whom has been collected, in the course of such prior proceeding, any portion of the amount for which he is liable for or on account of the stock held or owned by him, shall be credited upon any assessment levied against said stock as in this section provided with the full amount so paid by or collected from him.

SECTION 13. This act shall not apply to any action now pending to which stockholders of such corporations have been made parties under the provisions of chapter seventy-six (76), General Statutes, of eighteen hundred and ninety-four (1894) and acts amendatory thereto, and in which the issue as to who are stockholders has heretofore been tried and determined by the courts; except that after final judgment in such action, if a proper case exists under the provisions of section twelve (12) of this act, the Court and parties may proceed in the manner prescribed by said section twelve (12).

SECTION 14. All acts and parts of acts inconsistent herewith are hereby repealed.

SECTION 15. This act shall take effect and be in force from and after its passage.

Approved April 18, 1899.

On March 4, 1901, while the property of the corporation was in the possession of the receiver in the foreclosure action, the Merchants' National Bank, of St. Paul, Minnesota, brought an action against the company to recover upon a renewal note given for money claimed to have been loaned the company twelve years before, in 1889 (p. 47), and in that action recovered judgment on May 6, 1901, for the sum of $2,938.07. Executions being returned unsatisfied, the Bank, as a judgment creditor, instituted an action, professedly under the provisions of chapter 76 of the General Statutes of Minnesota for 1894, quoted above (p. 58), for the sequestration of the property of the company and the appointment of a receiver.

The sequestration action was brought in the District Court of Washington County, Minnesota, on August 15, 1901 (p. 51), after the foreclosure sale. The complaint first sets forth the judgment obtained by the Bank, and the return of executions thereon, and alleges "that the said defendant corporation has no property out of which the said judgment can be satisfied" (pp. 47, 48). It then refers to the mortgage and the foreclosure action, and alleges that "all of the property of said defendant corporation, of every kind and nature and wheresoever situated, was sold by said special master. * * * That by reason of such foreclosure sale the defendant has no property whatsoever out of which the judgment of the plaintiff or any part of the same can be paid or satisfied (p. 49)." The complaint then sets forth the amount of stock outstanding, and an indebtedness to other creditors in excess of $300,000, and avers that the creditors are without remedy unless a receiver be appointed to sue the stockholders.

The summons and complaint in this sequestration action were served upon E. D. Buffington, who had been secretary and general manager of the company, and receiver in the foreclosure action, and who was also a creditor of the company in the sum of $65,725.50. Buffington did not inform any

of the other officers or directors of the company of the bringing of the action, and none of them knew of it. He simply handed the summons and complaint to one S. Blair McBeath, who had acted as attorney for the company in the foreclosure action and in other matters, and requested him to appear for the company (pp. 51, 53).

On the following day, August 16, 1901, McBeath, without any other authority or instructions, appeared in the District Court on behalf of the corporation, and thereupon, and without notice to any one else, a decree was forthwith made sequestering the property of the corporation, and appointing Theodore R. Converse, the plaintiff here, receiver of the property of the corporation. By this decree the Court undertook to invest the receiver "with full authority to sue for, collect, recover, compromise, and settle any and all stockholders' liability that may exist under the constitution and laws of the State of Minnesota or otherwise, and to prosecute and sue for the amount of such liability or any assessments that may be made by this Court on account thereof for the satisfaction of the claims of the creditors of said defendant, and of the expenses of the administration of this trust, including the fees, allowances, and expenses of said receiver and his counsel, with full power and authority, to sue for and enforce the collection of any assessments or stockholders' liability either in the courts of the State of Minnesota or the courts of any other State or territory or the courts of the United States, sitting in any State or territory of the United States." The decree further provided that "In addition thereto the said receiver is hereby vested with all the usual and ordinary powers of receivers in equity." It directs the receiver to take into his possession any assets he may learn of, and to hold all moneys he may collect from stockholders' liabilities or otherwise, "until the further order of this Court, except that said receiver is authorized out of any such funds to pay, first the current expenses incident to the creation or administration of this trust, including the compensation of such attorneys, agents, and employees as he may employ to aid him in administering the said trust, and enforcing the said assessments and stockholders' liability" (pp. 53-55).

The receiver qualified under this decree (p. 56). No property or assets of the company at any time came into his hands (p. 27).

On September 3rd, 1901, the District Court which appointed the receiver made an order on his petition, requiring creditors of the company to prove their claims and become parties to the action within six months after the publication of the order, and decreeing that the order should be published, and also copies mailed to the creditors (p. 56). This order did not require any notice to stockholders, and none was in fact given (p. 57).

A number of persons claiming to be creditors presented claims which were allowed by the Court to the amount of $443,752.17, including interest to December 11, 1902 (p. 57). The greater portion of these claims were based on renewal notes given for debts of the company contracted in the years 1893 and 1894, and in some cases even before that (pp. 101-114).

On April 16, 1902, the receiver filed his petition in the District Court, praying for an assessment upon the stockholders. It recites the appointment of the receiver; the bringing of the sequestration action under the provisions of chapter 76 of the General Statutes of Minnesota of 1894; the mortgage foreclosure; the appointment, in the foreclosure suit, of a receiver of all the property of the corporation; the foreclosure sale, and that by reason thereof the corporation "is wholly without assets or property of any sort or nature out of which the claims of the creditors of the said defendant or any part of such claims can be paid, collected or realized." It then recites the notice to creditors to prove claims, and that creditors for $381,725.79 have become parties, and creditors in the further sum of $23,679.15 have not become parties. It states that the stockholders are liable "to an amount not exceeding the par or face value of the stock held by said stockholders respectively, for the satisfaction of the claims of the creditors"; that there are outstanding 27,967 shares of preferred stock, and 42,594 shares of common stock, some of which are held in the names of trustees; that the receiver "shortly after his appointment commenced a thorough investigation as to the stockholders of said defendant, and as to their solvency

and ability to respond to such assessment as this Court may order;" that such investigation showed that 18,801 shares of preferred stock, and 9,877 shares of common stock were held by persons able to pay an assessment, in addition to 3,548 shares of common stock held by trustees for solvent beneficiaries, and in addition to some others who might be able to respond to an assessment. The petition closes with the following averment: "Your petitioner further avers that he has already incurred a very considerable expense in conducting the examination necessary to properly advise this Court as to the situation regarding said stockholders and their solvency, and that it is impossible at the present time to determine the expense of administering this trust and collecting the liability of the stockholders for the benefit of the creditors herein, but your petitioner avers that owing to the fact that legal proceedings will have to be instituted in many different States and in many different counties of different States and against so large a number of stockholders, and in view of the fact that the amount involved in such litigation is large and the responsibility of the same is great, that in considering the amount for which assessment should be levied a very considerable sum must necessarily be added for the expense of collection and administration." The petition prays for an assessment "for the purpose of providing funds for the payment of the expenses of this receivership, in the enforcement of such stock liability, and for the payment of the indebtedness of said defendant" (pp. 57-65).

On this petition, the District Court, on December 22, 1902, made an order assuming to levy the assessment of $18 a share, to recover which these actions were brought (pp. 65-67). That order recites the making of a prior order on April 16, 1902, the same day on which the petition for the assessment was presented, and that copies of that order "were duly published, mailed and served in the manner therein prescribed." The order of April 16, 1902, is not in the record, and it does not appear what kind of notice, if any, it required to be given to the stockholders; but this is not material, so far as these defendants are concerned, inasmuch as it is conceded that the defendants are not and never had been residents of the State of Minnesota, and were not parties to and had no knowledge

in fact of the proceedings wherein the assessment sued upon was made (p. 41).

A few of the stockholders appeared in the District Court, and objected to the proceedings, and after hearing their counsel and counsel for the receiver, there being no appearance by the corporation nor by any one else, the Court made its determination "that it is necessary and proper that an assessment of eighteen dollars ($18) on each share of capital stock of said corporation be directed and levied herein against all parties liable as stockholders of said defendant." The order then proceeded to direct the payment of such assessment, being 36% of the par value of the stock, directed the receiver to give notice by mail of the making of the order, and ordered him to collect the assessment, and "to forthwith institute and prosecute such action or actions or other proceedings against such person, persons, corporation or party liable in any court having jurisdiction, whether in this State or elsewhere which said receiver may deem necessary or proper for the recovery of the amount due."

Some of the stockholders who opposed the making of the order appealed from it to the Supreme Court of Minnesota, which affirmed the order (pp. 67, 68); the sole question considered in the opinion being whether the stockholders were exempt from liability on the ground that the Minnesota Thresher Manufacturing Company was a manufacturing company (pp. 68-72).

After the making of the assessment order, the receiver mailed notices of its making to the stockholders whose names and addresses were known to him (p. 67). Isaac Bernheimer had died September 5, 1893 (p. 122), and Simon Bernheimer had died April 26, 1900 (p. 98). Both had left property in Minnesota, and wills which had been there admitted to probate (pp. 98, 122). Nevertheless, the receiver, not knowing of the deaths of these stockholders, caused the notices of the making of the order to be mailed, addressed to Simon Bernheimer and Isaac Bernheimer, respectively, at 320 Broadway, New York City (p. 101). No notice or process in the name or address of these defendants, either individually or as executors, was ever issued or served or published, in the State of Minnesota, or elsewhere (p. 101).

In making the assessment order, the Court included as a basis of the assessment the expenses stated in the petition for the assessment—including estimated expenses of the receivership, of investigations as to the solvency of stockholders, of litigations in many different jurisdictions, and of administering the fund. How generously the Court allowed for these items will be seen by comparing the amount of the indebtedness which was to be paid with the amount of money to be raised. The total indebtedness allowed, including interest, amounted to $443,752.17 (p. 57). An assessment of $18 a share on the entire outstanding capital stock of 70,561 shares (p. 65) would produce $1,270,098. Taking the receiver's own *ex parte* estimate, the holders of 32,226 shares would be able to pay the assessment (pp. 63, 64). The assessment on these shares alone would produce $580,068, an excess over the amount required to pay the debts in full with interest, of $136,315.83, or over thirty per cent!

It was for the recovery of this assessment that the receiver brought these actions. The actions were commenced on January 28 and 29, 1904, respectively (pp. 73, 122). The complaint rests the cause of action squarely upon the order of assessment as on a judicial determination binding on the defendants. No facts were alleged, nor did plaintiff attempt to prove any, to show that defendants could lawfully be called upon to pay the amount of the assessment, unless by virtue of such determination (pp. 4-13); and the complaint concludes with the allegation that the amount demanded is due "in and by the authority of said last mentioned order or decree" (p. 13).

The answer admitted that the defendants' testator was a stockholder in the Minnesota Thresher Manufacturing Company, and put at issue the remaining allegations of the complaint. It also pleaded, among other defenses, that the statute under which the assessment proceedings were had, and the assessment proceedings, impaired the obligation of the defendants' contract as stockholders, and deprived them of their property without due process of law, and denied them the equal protection of the laws; that the Minnesota Thresher Manufacturing Company was a manufacturing corporation;

and that the action was barred by the statutes of limitations which will be referred to below (pp. 17-20).

The cases came on for trial before the Honorable George C. Holt, District Judge, and a jury, on March 9, 1906. At the opening of the trial, counsel for the defendants moved for a dismissal of the complaint for insufficiency, and for judgment for the defendants on the pleadings (pp. 24, 25), the grounds of which motion are more fully set forth in the assignment of errors.

This motion, under the New York practice, was equivalent to a demurrer to the complaint.

> Satterlee *vs.* Kobbe, 173 N. Y., 91, 102.
> St. Regis Paper Co. *vs.* Santa Clara Lumber Co., 173 N. Y., 149, 157.

The right to take the objection was not waived by failing to demur.

> Pope *vs.* Terre Haute Car & Mfg. Co., 107 N. Y., 61, 66.
> Kelly *vs.* Security Mutual Life Ins. Co., 186 N. Y., 16.

The motion had the same effect in the federal court sitting in New York.

> Central Transportation Co. *vs.* Pullman Car Co., 139 U. S., 24, 39, 45.
> Roberts *vs.* Lewis, 144 U. S., 653, 656, 657.

The Court reserved decision on the motion (p. 25). Plaintiff then proved the incorporation of the Minnesota Thresher Manufacturing Company, the appointment of the receiver, and the order levying the assessment, and rested (pp. 25-28). Defendants' counsel renewed the motion for a dismissal on the same grounds as before, and on the further ground of a failure of proof (p. 28). The Court again reserved decision until all the evidence should be in. Thereupon the defendants proved the remaining facts, as stated above, for the purpose of showing more clearly the invalidity of the assessment (pp. 28, 103).

At the close of the whole case, defendants' counsel renewed the motion for a dismissal upon the same grounds, together with additional grounds stated below (p. 114). The Court denied each of the defendants' motions for a dismissal, as well as a motion for the direction of a verdict for the defendants, and granted a motion for the direction of a verdict for the plaintiff, to each of which rulings defendants excepted (p. 114).

The jury, by direction of the Court, rendered a verdict for the plaintiff for $3,600 and interest in each case, upon which judgment was entered on March 14, 1906, for $4,318.07 in each case (p. 23).

By stipulation between the parties, they have agreed that the record in one case may stand as the record in both, with the changes noted in the stipulation (pp. 121-125).

These cases are brought to this court by writ of error, under the authority of the sixth paragraph of the enumeration in Section 5 of the Act of Congress of March 3, 1891, establishing the Circuit Courts of Appeals (26 Stat. at L., ch. 517, p. 827), which permits such writ in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

In such a case, the writ brings up the entire record, and this Court determines not only the constitutional question, but every question in the case.

Holder *vs.* Aultman, Miller & Co., 169 U. S., 80, 88, 89.

Loeb *vs.* Trustees of Columbia Township, 179 U. S., 472, 480, 481.

The defendants duly filed the following

Assignment of Errors.

(1) The Court below erred in denying the motion of the plaintiffs in error made upon the opening of the trial for a dismissal of the complaint and for judgment for the plaintiffs in error, the defendants below, on the following grounds:

1. That the complaint does not state facts sufficient

to constitute a cause of action in favor of the plaintiff against the defendants.

2. That Chapter 272 of the General Laws of Minnesota of 1899 under the alleged authority of which the assessment here sued upon is claimed to have been levied, contravenes the provisions of Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of the contracts of the stockholders of the Minnesota Thresher Manufacturing Company, and of the creditors of the said corporation, and particularly of the defendants' testator and of these defendants as his executors.

3. That these defendants were not parties to the proceeding in which the said assessment was assumed to be levied, and are not bound thereby.

4. That the said Chapter 272 of the General Laws of Minnesota of 1899, and all proceedings had thereunder, so far as it is sought thereby to charge with liability or to affect these defendants, or to take their property in the amounts and for the purposes mentioned in the complaint, contravene the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States, in that they deprive the stockholders of said corporation, who were not parties to the said proceedings, nor heard therein, nor served with process therein, and particularly these defendants, of property without due process of law, and deny to them the equal protection of the laws.

5. That the District Court of Washington County, Minnesota, had no jurisdiction to entertain the said proceedings or to appoint a receiver, or to levy an assessment therein, because the proceeding in said court was not a proceeding of the nature contemplated by, or instituted in the manner directed in, said Act of 1899, or Chapter 76 of the General Statutes of Minnesota.

6. That the plaintiff has no such title or interest as gives him a standing to maintain this action in a court of a jurisdiction other than that in which he was appointed.

7. That the said Minnesota Thresher Manufacturing Company was a corporation organized for the purpose of carrying on a manufacturing business, and its

stockholders are exempt from liability under the provisions of Section 3 of Article X of the Constitution of the State of Minnesota.

8. That this action was not brought within two years after these defendants or their testator ceased to be stockholders in said corporation, within the meaning of Section 55 of the Stock Corporation Law of the State of New York.

(2) The Court below erred in denying the motion of the plaintiffs in error, made at the close of the plaintiff's case for a dismissal of the complaint and for judgment for defendants upon all of said grounds and on the additional ground that no cause of action had been pleaded or proved.

(3) The Court below erred in denying the motion of the plaintiffs in error made at the close of the evidence for a dismissal of the complaint on all of said grounds and on the following additional grounds:

9. That no cause of action had been pleaded or proved.

10. That the cause or causes of action on many of the claims to pay which the said assessment was levied, accrued more than six years before the commencement of this action.

11. That no judgment against the said corporation was obtained on many of the claims to pay which the said assessment was levied.

12. That many of the alleged debts to pay which the said assessment was levied were not payable within two years from the time they were respectively contracted.

13. That no action was brought against the said corporation upon many of said debts within two years after they became due.

(4) The Court erred in refusing to direct a verdict in favor of the plaintiffs in error, the defendants below on all the grounds heretofore stated.

(5) The Court erred in granting the motion of the defendant in error, the plaintiff below for a direction of a ver-

dict in favor of said plaintiff and against said defendants, and in directing such verdict as aforesaid.

(6) The Court erred in rendering a judgment in favor of the defendant in error and against the plaintiffs in error.

(7) The Court erred in refusing to hold that the Laws of Minnesota for 1899, being Chapter 272 of said laws, are in contravention of the Constitution of the United States.

(8) The Court below erred in holding that the plaintiff might recover interest, and in including interest in said judgment rendered herein, and in giving judgment in favor of the plaintiff and against the defendants for too great an amount.

(9) The complaint does not support the judgment.

(10) The said judgment was given in favor of the said Theodore R. Converse, as Receiver of the Minnesota Thresher Manufacturing Company, defendant in error, the plaintiff below and against the said Mayer S. Bernheimer and Lorin S. Bernheimer, as surviving executors of the last will and testament of Simon Bernheimer, deceased, the plaintiffs in error, the defendants below whereas by the law of the land it ought to have been given in favor of said defendants and against the said plaintiff (pp. 115-117).

State of the decisions regarding the law of Minnesota and the assessment here in suit.

At the time when the defendants' testators acquired their stock, in 1885, the only decision construing the provisions of the Constitution and statutes of Minnesota imposing a double liability on stockholders, was the case of *Allen vs. Walsh*, 25 Minn., 543, which held that the Constitution and the statute must be construed together.

Between 1885 and 1899 there were many decisions of the courts of Minnesota on this subject. These decisions, while of great persuasive force, were not in existence when the contract of subscription for shares was made, and did not enter into that contract, and are not binding on this court; but this

court has repeatedly held that it will determine for itself what was the defendants' contract.

Burgess *vs.* Seligman, 107 U. S., 20, 33, 34.
Brunswick Terminal Co. *vs.* National Bank, 192 U. S., 386, 396.
Great Southern Hotel Co. *vs.* Jones, 193 U. S., 532, 542-548, and cases there cited.

The Minnesota decisions here referred to agree, as to the nature of the liability, with the decisions of this court regarding similar liabilities. They hold, in substance, that the double liability of stockholders under the laws of Minnesota is in its nature a liability on the part of all the stockholders to contribute ratably, not in excess of the stock owned by them, to a common fund for the benefit of all the creditors of the corporation, for the purpose of making good any deficiency in the corporate assets for the payment of the corporate debts; a liability which can be justly enforced only by a proceeding in equity, to which all the creditors and all the stockholders are parties, to the end that the liability may be properly apportioned among the stockholders, and the fund resulting therefrom may be properly apportioned among the creditors; and that as no other form of remedy is appropriate to a liability of this nature, the remedy described is the exclusive remedy.

Patterson *vs.* Stewart, 41 Minn., 84.
In re Martin's Estate, 56 Minn., 420.
Winnebago Paper Mills *vs.* Northwestern Printing & Publishing Co., 61 Minn., 373, 376.
National New Haven Bank *vs.* Northwestern Guaranty Loan Co., 61 Minn., 375.
Hanson *vs.* Davison, 73 Minn., 454.

The same view was taken by this court in passing on the provisions of the Constitution and laws of Minnesota on this subject, and this court held that the double liability of stockholders in Minnesota corporations was of such character as not to be enforceable by an action to which the stockholders were not parties, nor by an action against an individual stockholder.

Hale *vs.* Allinson, 188 U. S., 56.
Finney *vs.* Guy, 189 U. S., 335.

The act of 1899 entirely changed this rule. The constitutionality of that statute has been upheld by the Supreme Court of Minnesota, holding that the only change effected was a change in the remedy which did not impair the obligation of the stockholders' contract, and that the stockholders are deemed to be represented by the corporation in the assessment proceedings, and so are parties.

Straw & Ellsworth Mfg. Co. *vs.* Kilbourne Boot & Shoe Co., 80 Minn., 125.
London, &c., Mtg. Co. *vs.* St. Paul Park Improvement Co., 84 Minn., 144.

It is needless to argue the point that these decisions are not binding on this court.

The question of the constitutionality of the act of 1899 was presented to Judge Lowell in

Robinson *vs.* Brown, 126 Fed., 429.

The court there simply stated, without discussing the constitutional questions, that it was disposed to agree with the decision of the Minnesota Supreme Court. The constitutional question was only one of a number of questions raised by the defendant stockholder in that case, and appears to have been abandoned on his appeal to the Circuit Court of Appeals for the First Circuit. That court affirmed the judgment, on the authority of *Hale vs. Hardon*, 95 Fed., 747, which sustained the receiver's right to sue an individual stockholder under the law as it existed prior to 1899.

Burget *vs.* Robinson, 113 Fed., 669.

Meanwhile, the Circuit Court of Appeals for the Third Circuit had, in *Hale vs. Allinson,* 106 Fed., 258, denied the receiver's right under the former law to maintain such actions, and the same result had been arrived at by the Circuit Court of Appeals for the Second Circuit in *Hilliker vs. Hale,* 117 Fed., 220. These two cases were brought to this court by

certiorari, and their doctrine approved, and the holding in *Hale vs. Hardon* overruled.

Hale *vs.* Allinson, 188 U. S., 56.

The defendant in the *Burget* case also applied to this court for *certiorari,* basing his contention not on any constitutional ground, but on the ground that his case was governed by the decision in *Hale vs. Allinson.* It was evident, however, that an action under the former law, and an action under the new statute, involved quite different questions; and these questions this court, by denying the petition for *certiorari* in the *Burget* case, decided not to determine at that time.

Burget *vs.* Robinson, 188 U. S., 739.

No constitutional question was raised in that case, either in this court, or in the Circuit Court of Appeals.

This was the state of the decisions when the assessment here in suit was levied. The receiver has brought numerous actions in different jurisdictions to recover the amount of the assessment from individual stockholders. A number of these actions have not yet been brought to trial, but are held awaiting the decision of this court in the cases now before it. Some of them, however, have been carried to final judgment, and in each of these cases, the determination of the highest court which has yet passed on the questions involved has been in favor of the stockholders and against the right of the receiver.

Converse *vs.* Aetna National Bank, 64 At., 340.
Converse *vs.* Stewart, 105 N. Y. App. Div., 478.

In *Converse vs. Aetna National Bank, supra,* the court below rendered judgment in favor of the receiver, which was reversed by the Supreme Court of Errors of Connecticut. The opinion of the court is written by Mr. Justice Simeon E. Baldwin. The chief ground of the decision is that the act of 1899 is unconstitutional in that it impairs the obligation of the stockholders by adding to their liability for corporate debts a liability for the expenses of the receivership; but the opinion points out several other objections to the statute.

In *Converse vs. Stewart, supra,* Hon. William G. Choate,

referee, had held in favor of the receiver, substantially on the same grounds taken by the Minnesota Supreme Court; but the Appellate Division of the Supreme Court, an intermediate appellate tribunal, reversed the judgment, and ordered a new trial. Four justices sat in the case, all of whom concurred in the decision in favor of the stockholder; but the opinion, which was concurred in by only two of them, held that the defendant, as a beneficial holder of the stock, was not liable, and that not having been a party to the assessment proceedings, he was not bound by the assessment order. The new trial was had before Hon. William N. Cohen, as referee, who decided in favor of the defendants on the authority of the decision of the Appellate Division; and the Appellate Division reaffirmed its decision by a decision affirming this judgment, rendered February 8, 1907, and not yet reported.

The same result was reached in the case of *Converse vs. Ayer*, decided in the Superior Court for the County of Suffolk, Massachusetts, a court of original jurisdiction, on January 2, 1906. An appeal from that decision is now pending in the Supreme Judicial Court of Massachusetts, awaiting the decision of this court in the cases now before it. The decision is not reported, but counsel have been furnished with a copy of the memorandum handed down by Hon. Jabez Fox, the judge who tried the case, as follows:

> "I find for the defendant on the ground that the Act of 1899 imposes new burdens upon the stockholders in that it provides for an assessment which shall cover not only the debts of the corporation, but the probable expenses of collecting the assessment, and provides further that such assessment shall be conclusive as to all the stockholders, including those who are not notified of the proceedings and are not within the jurisdiction of the court. Undoubtedly a stockholder may agree to submit to a foreign assessment, just as he may appoint an attorney, to accept service in a foreign jurisdiction, and this is all that Howarth-Lombard decides. But the scope of his agreement is to be determined by the state of the law at the time of his subscription."

The constitutional questions now before the court were presented to this court, in an action on this same assessment against another stockholder of the Minnesota Thresher Man-

ufacturing Company. The Court held that the stockholder there, which was a national bank, had no power to subscribe for shares, and consequently could not be liable as a shareholder. It therefore declined to pass on the constitutional questions, as they were not necessary to the decision of the case then before it, and directed judgment in favor of the stockholder.

First National Bank of Ottawa *vs.* Converse, 200 U. S., 425.

Similar questions were presented to this court, and expressly left open, in

Evans *vs.* Nellis, 187 U. S., 271.

In that case, the Circuit Court had held unconstitutional, upon substantially the grounds here taken by the plaintiff in error, the act of Kansas, passed in 1899, which changed the law as to the double liability of stockholders in Kansas corporations (*Evans vs. Nellis*, 101 Fed., 920). The Circuit Court of Appeals certified to this Court the question of the constitutionality of the statute. This Court determined that the action there before it could not be maintained, because the receiver in that case had not complied with the provisions of the act itself, and consequently it became unnecessary to determine the constitutional questions certified. In so deciding, Mr. Justice White, speaking for the court, made the following statement at page 208:

> "Of course, in answering this question, we express no opinion whatever as to how far, if at all, the act of 1899 could validly operate to repeal the right of action in favor of creditors given by the Kansas statute of 1868, so far as creditors are concerned, whose debts accrued prior to the repeal. We of course also express no opinion whatever upon the question of how far the rights and remedies conferred by the act of 1899 could lawfully be enforced against stockholders in corporations who became such stockholders prior to the passage of that act. And this of course excludes the intimation of any opinion as to how far the judgment rendered in the court of Kansas in a suit brought by a receiver against the corporation and the resident stockholders, to fix the sum required to pay the corporate debts,

would be binding upon non-resident stockholders not directly a party to such action, especially where their subscription to stock had been made prior to the enactment of the act of 1899."

These questions, thus expressly left open, are the precise questions which are now squarely presented to this Court for decision with respect to the Minnesota Act of 1899. Our contention is that while the precise questions have not been determined by this Court, the application of principles long established and well settled will necessarily lead to a determination against the constitutionality of the act in question.

POINTS.

I.

The statute of 1899, under which the proceedings for the assessment were taken, impairs the obligation of the contract between the stockholders and the creditors.

That the liability now in question is a contractual liability is alleged in the complaint (p. 9), and is settled by authority.

Hanson *vs.* Davison, 73 Minn., 454, 460.
Flash *vs.* Conn, 109 U. S., 371, 377.
Hawthorne *vs.* Calef, 2 Wall., 10.
Whitman *vs.* Oxford National Bank, 176 U. S., 559, 563.
Knickerbocker Trust Co. *vs.* Myers, 133 Fed., 764, affirmed,
Myers *vs.* Knickerbocker Trust Co., 139 Fed., 111, 112, 114.
Carroll *vs.* Green, 92 U. S., 509, 513.

The terms of the stockholders contract are embodied in the constitution and statutes in force at the time when he acquired his stock.

Von Hoffman *vs.* City of Quincy, 4 Wall., 535, 550.
Webster *vs.* Bowers, 104 Fed., 627.

The constitution and the statute are to be construed together.

Allen *vs.* Walsh, 25 Minn., 543, 551.
Whitman *vs.* Oxford National Bank, 176 U. S., 559, 563.
Middletown National Bank *vs.* Toledo, &c., Ry. Co., 197 U. S., 394, 405.

The provisions creating the liability are to be strictly construed, and cannot be extended beyond the words used.

Brunswick Terminal Co. *vs.* National Bank of Baltimore, 192 U. S., 386, 390.
Converse *vs.* Aetna National Bank, 64 At., 341, 344.

The question whether the statute of 1899 impaired the obligation of the contract, is not complicated in the case at bar by any reserved right to alter, amend or repeal corporate charters, as no such right is reserved by the constitution or statutes of Minnesota.

The statute of 1899 changed the contract of the stockholders and impaired its obligation in the following important respects:

(1) It added to the liability of the stockholders the costs and expenses of the receivership, whereas before, they had been liable only for the deficiency in assets to pay the debts owing to creditors.

(2) It added to the liability of the stockholders claims against the corporation other than its debts, and liabilities incurred after the corporation has been put into liquidation by the court.

(3) It added to the liability of the stockholders such amounts as the court might estimate as "probably" required

to meet a probable deficiency in the amount which may be realized "within a reasonable time" from the "probable amount" of assets, for the payment of the "probable indebtedness."

(4) It added further the "probable expenses of collecting the assessment" from other stockholders, taking into account the "probable solvency or insolvency of stockholders."

(5) It changed the entire nature of the liability from a liability to all the creditors, generally, enforceable only in an action in equity at the corporate domicile with all stockholders and creditors as parties, to a liability which can, at least as to non-resident stockholders, be fixed by proceedings to which they are not parties, and of which they have received no notice, and permits the liability so fixed to be enforced by an action against any one stockholder by a receiver in a court of law at the domicile of the stockholder.

(6) It deprived the stockholders of their right to be heard regarding the claims of creditors as well as of the right to vested defenses against such claims.

(7) It changed the liability from a liability to the creditors, to a liability to a receiver to be appointed by the court.

(1) THE ADDITIONAL LIABILITY FOR EXPENSES OF THE RECEIVERSHIP (Section 3).

Under the law, as it was before, stockholders could not be made liable otherwise than to the creditors for the deficiency in their debts. They were not responsible for the expenses of a receivership or for the receiver's commissions, nor could they be held for the expenses of the receiver in prosecuting actions in other jurisdictions.

It may be argued that the corporate assets might be used to cover the expenses of the receivership, and if what remained was insufficient to pay the corporate debts, the stockholders would be liable for the deficiency, and so, in a sense, they might be made to incur the burden of the expense of the receivership. The answer to this is that that burden could be imposed only to the extent of the sufficiency of the corporate assets to meet the expenses of the receivership. In

a case where there were no corporate assets, or not enough to pay the receiver's expenses and commissions, the creditors could in no event have been liable for the deficiency, but only for the amount of debts actually due creditors.

It will also be argued, that the costs and expenses of the receivership are properly chargeable against the stockholders, as an incident of the proceedings to collect the assessment. This argument would be sound, if each stockholder's liability for costs were limited to those incurred in the suit against him; but no new legislation would have been necessary to accomplish this result, for costs of suit have always been imposed on unsuccessful litigants. The additional burden which the statute imposes on the stockholder is the liability to pay expenses incurred by the receiver in making investigations and bringing and conducting suits, successful or unsuccessful, against other stockholders, as well as all other expenses incurred by him for any purpose whatever. The distinction between such a liability and the ordinary liability for costs, was clearly pointed out by this court in

Richmond *vs.* Irons, 121 U. S., 27, 65, 66.

See also

Matter of Thompson, 184 N. Y., 36, 45.

The imposition of this additional liability was held to impair the obligation of the contract, in

Converse *vs.* Aetna National Bank, 64 At., 341, 343, 344.

The opinion of Mr. Justice Baldwin in that case clearly points out how this provision increases the stockholder's burdens.

How greatly the stockholders' burdens have been actually increased in the case at bar under the authority of the provision in question, is shown by the record. The figures summarized above show that out of $580,068 expected to be realized from solvent stockholders, only $443,752.17 represents actual indebtedness, to which has been added $136,315.83, or over 30%, for receiver's expenses. About one-fourth of the

amount of the assessment, therefore, represents the amount which the stockholders are called upon to contribute to the expenses of the receivership—so that, in each of the judgments here rendered of $4,318.07, the defendants are called upon to pay to the receiver $1,000, which they would not have been obliged to pay if this statute had not been passed.

Nay, more: by the decision of this court in *First National Bank vs. Converse*, 200 U. S., 425, the National banks are relieved from liability, as stockholders. The holdings of National banks included in the list of stockholders (pp. 73-78) are estimated at 11,946 shares, out of 32,226 solvent stockholders, as estimated by the receiver, or more than one-third of the total holdings. In order to pay the amount called for by the court, the receiver will doubtless call upon the Minnesota court for another *ex parte* order increasing the assessment on the remaining stockholders by upwards of 50%, to meet the deficiency arising from the decision of this court; and in that assessment these defendants will be called upon to pay the receiver's expenses of preparing for and prosecuting the unsuccessful suits against the banks. If the suits had been brought by creditors under the former law, will it be supposed for one moment that the defendants could have been compelled to compensate the creditors for the expenses and costs of unsuccessful suits against other defendants?

(2) THE ADDITIONAL LIABILITY FOR CLAIMS OTHER THAN CORPORATE DEBTS, AND FOR LIABILITIES INCURRED AFTER LIQUIDATION.

The former act provides for an assessment of stockholders only "if the property of such corporation is insufficient to discharge its *debts*" (Chapter 76, General Statutes, Section 5909). The new act provides for the appropriation of the assessment levied to the payment of "all indebtedness of *and claims against* said corporation, proved or allowed in said proceedings" (Section 11). This adds to the liabilities assumed by the stockholder to pay the debts of the corporation, a liability to pay any claims against it, as, for example, for torts or claims for damages of any kind, not incurred in the regular course of the corporation's business.

1 Cook on Corporations (5th edition), section 217.

Taylor on Private Corporations (5th edition) section 734.
Child *vs.* Boston & Fairhaven Iron Works, 137 Mass., 516.
Bohn *vs.* Brown, 33 Mich., 257.
Zimmer *vs.* Schleehauf, 115 Mass., 52.
Doolittle *vs.* Marsh, 11 Neb., 243.
Cable *vs.* Gaty, 34 Mo., 573.

There is also a material difference between a liability incurred by the corporation as a going concern for which the stockholders are properly liable, and the liability which some receiver may be incurring while the corporation is in liquidation. The new act makes the stockholders liable indiscriminately for all claims which may be proved in such liquidation proceedings.

See

Danforth *vs.* National Chemical Co., 68 Minn., 308.
Richmond *vs.* Irons, 121 U. S., 27, 60, 61.
Schrader *vs.* Bank, 133 U. S., 67, 77.
Moss *vs.* Whitzel, 108 Fed., 579.

(3) THE ADDITIONAL LIABILITY FOR "PROBABLE" DEBTS TO MEET A "PROBABLE" DEFICIENCY.

The statute provides (Section 3) that the court shall determine from such proofs by affidavit or otherwise as may be offered, as to the "probable indebtedness" of the corporation, and the "*probable* amount" of assets available for that purpose, and in case it determines that such amount as may be realized from the assets "*within a reasonable time*" will "probably be insufficient" to pay these probable debts and expenses, the court has authority to order such proportionate assessment "as the court in its discretion may deem proper (taking into account the probable solvency or insolvency of stockholders and the probable expenses of collecting the assessment); and shall direct the payment of the amount so assessed against each share of said stock to the assignee or receiver within such time thereafter as said court may specify in said order."

In other words, it is left to the discretion of one judge to order and adjudge each stockholder to pay such an amount as he may deem proper on his estimate of "probable" indebtedness and expenses.

Contrast this with the liability assumed by the contract of the stockholder, to contribute his share or "so much thereof *as is necessary to satisfy the debts of the company*" (Chapter 76, General Statutes, Section 5909).

The Supreme Court of Minnesota has held that this liability is properly fixed in the equity proceedings contemplated by Chapter 76, by rendering judgment declaring each stockholder liable to the full amount of stock held by him, but that the court should levy and collect, from time to time, *only so much as should be actually required* to pay the debts and the costs of the action. The Court pointed out that it would be oppressive and improper to render an absolute judgment for any greater amount.

Harper *vs.* Carroll, 66 Minn., 487, 494, 495.

The same rule has been recognized and applied by this court.

Godfrey *vs.* Terry, 97 U. S., 171, 176, 177.

This method of action carefully protected the stockholder's right to have his liability confined to so much as was absolutely necessary to pay the debts. How different is the proceeding upon which it is now sought to hold the defendants, whereby the court, without the presence of the particular stockholder, and without hearing him, has assessed an arbitrary amount against his stock, an amount far in excess of his *pro rata* share of the actual indebtedness, and directs the receiver to sue the stockholder in his home State and to collect from him *the entire amount* so assessed.

In this respect the case differs from

Commonwealth *vs.* Cochituate Bank, 3 Allen, 42, 45.

In that case the court upheld a new statute providing for an assessment to make up a "probable deficiency," on the

ground that the statute meant only that, after hearing all parties, the court should assess "such sum as is actually required to discharge the claims of bill holders, or to approximate as near as may be to that sum;" and the court further said:

"If this language is to be understood to warrant an assessment upon stockholders beyond the real deficiency in the assets to discharge all claims of bill holders, it would be a change unwarranted as to liabilities of the stockholders that had accrued before the passage of the statute."

This is exactly the meaning of the language used in the Minnesota statute, as construed by the Minnesota Court, and consequently the case cited is direct authority to the effect that the statute is unconstitutional.

The judgment here sued upon does not even pretend to determine that the payment of this amount will be required for the purpose for which the stockholders, by their contract, agreed to pay. It determines only that in the opinion of the court that it is a proper amount and will "probably" be required,—not that it is actually required.

Nor does the statute limit the assessment to the amount that will probably be required to pay debts actually allowed, but it authorizes an assessment for the amount that will probably be required to pay the *probable* indebtedness; thus including claims that may never be proved, and, so will not be entitled to participate in the proceeds of any assessment.

Palmer *vs.* Bank of Zumbrota, 72 Minn., 266, 280.
Richmond *vs.* Irons, 121 U. S., 27, 66.

And whereas the original contract required the stockholders to pay only in case of an *actual deficiency of assets*, the new statute requires them to pay in case such amount as may be realized from the *ordinary assets* of the corporation *within a reasonable time* will *probably* be insufficient to pay the indebtedness *without delay*.

Under this provision, a corporation may, as is often the case, have assets that are amply sufficient to pay the debts. In such a case there would have been no liability at all under the former statute. Under the new statute, it needs only the determination of one judge that the assets will probably not

bring enough within a reasonable time to pay the probable indebtedness, to impose on the stockholders a liability that was never contemplated: and instead of being secondarily liable after the corporate assets are exhausted, they may be at once called on to pay as principal debtors.

It is submitted that this provision works a vital change in the contract.

(4) THE ADDITIONAL LIABILITY FOR THE PROBABLE EXPENSES OF COLLECTING FROM OTHER STOCKHOLDERS.

The imposition of this additional burden has been regarded as sufficient to invalidate the statute and the assessment here in suit, by the Connecticut and the New York Court.

> Converse *vs.* Aetna National Bank, 64 At., 341, 344.
>
> Converse *vs.* Stewart, 105 App. Div., 478, 486.

The Connecticut court particularly pointed out that the stockholder, in agreeing to become liable for a deficiency to pay debts, did not agree that "there might be added to the liabilities which it had thus assumed a liability measured by the estimate of the court as to what might be thereafter necessary for future expenses of future suits to collect what were never corporate assets."

The injustice of thus increasing the stockholders' burdens is strikingly exemplified by the large amount which, as shown above, has been imposed in the case at bar to cover such probable expenses.

(5) THE CHANGE IN THE NATURE OF THE LIABILITY.

The changes thus far discussed consist in *adding to the liabilities* assumed by the stockholders. The change now under consideration is more comprehensive. It consists in *changing the character of the liability.*

A comparison of the liability under the former law with that created by the new statute, will at once demonstrate the fundamental nature of the change.

Under the former law	Under the Statute of 1899
the liability was one from *all* the stockholders	the liability is one from *each* stockholder
to *all the creditors*	to a receiver representing, not the creditors, but the corporation
to pay each his *pro rata* share	to pay a fixed sum, estimated as his probable share
of the *actual deficiency* in assets to pay debts	of the *probable* deficiency in the amount that may probably be realized in a reasonable time from the ordinary assets, to pay probable debts, claims and expenses of the receivership
as determined by a court of equity, after hearing all the stockholders and all the creditors,	as assessed *ex parte* by a single judge, without hearing the stockholders,
with no liability on the part of stockholders not made parties.	such assessment being a liability conclusively determined against every stockholder, though not a party.

This is much more than a change in the remedy; it goes to the very substance of the contract, and substitutes a liability of one kind for a liability of a different kind.

Contract rights and liabilities may not be changed indirectly, under the guise of a change in the remedy, any more than they may be changed directly by declaring them to be altered. Nothing is more vital to a right than the remedy by which it is sanctioned and enforced. Without a remedy, a so-called right is an empty name. By taking away the remedy for enforcing a right, the right itself may be destroyed.

By giving a remedy where there was none before, a new right may be created. By substituting for a remedy appropriate to the enforcement of one liability, a remedy appropriate to the enforcement of an entirely different liability, a complete change in the nature of the liability may be effected. That is precisely what has been done here.

Stockholders' liabilities for corporate debts are of different kinds. The terms of the stockholder's contract are usually found in the corporate charter, or other laws under which the corporation is formed, and with reference to which the stockholders contract. A stockholder may thus agree to be answerable directly to any creditor up to a fixed amount; or he may agree to be so answerable to the corporation or its receiver; or he may agree to pay an assessment to be fixed by a court, with or without notice, or by a receiver, or in some other manner agreed upon in advance; or he may agree to pay his share of a deficiency, to be ascertained by judicial proceedings to which all the creditors and all the stockholders are parties. Each one of these undertakings differs materially from each of the others. Each must be enforced by such remedy as, from the very nature of the undertaking, is appropriate for its enforcement. The first of the liabilities enumerated is appropriately enforced by an action at law by any creditor against any stockholder; the second, by proceedings by the corporation or its receiver against one stockholder at law, or against all in equity; the third, by assessment proceedings, followed by an action at law against each stockholder, to recover the amount of the assessment; and the fourth, by an action in equity at the corporate domicile, to which all the creditors and all the stockholders are parties. One liability cannot be substituted for another without the consent of the parties; for that would impair the obligation of the contract by substituting a different contract. But if this cannot be done directly, it is clear that it cannot be done indirectly, by substituting for the remedy appropriate to the enforcement of one contract, a remedy which is adapted only for the enforcement of a different contract.

The Statute of 1899 does this very thing. The stockholders agreed to pay each his share of an actual deficiency. The amount of such deficiency, and of each stockholder's share

could, in the nature of the case, and in the absence of any statute, have been justly determined only by equity proceedings to which all creditors and all stockholders were parties; and so the laws of Minnesota provided when the contract was made, and so the courts of Minnesota, as well as this court have repeatedly held. The stockholders never agreed to pay any assessment which might be made without hearing them, whether based upon proof, or upon an estimate of probable requirements, or made arbitrarily. Yet by the Statute of 1899 the legislature of Minnesota says to the stockholders: From henceforth you will no longer pay only your judicially determined share of the actual deficiency, as determined by a court of equity after hearing all parties; but you must pay such amount as a single judge, without notice to you, "may deem proper." To this the stockholder's answer is "*Non haec in foedera veni.*" The new statute attempts to substitute for the contract which the stockholder made, one which he never agreed to. Against that attempt, the stockholders justly, it is submitted, invoke the protection of the Federal Constitution.

These conclusions are supported by many decisions of this court, of the courts of Minnesota, and of the courts of other jurisdictions, to which the length of this brief permits only a reference.

It has been repeatedly decided that the stockholders' contract here in question can be appropriately enforced only by an action in equity at the corporate domicile, to which all creditors and all stockholders are parties; and that this is so, not only because so provided by statute, but because of the very nature of the liability, so that even in the absence of the statute, that remedy would be the only appropriate and exclusive remedy for enforcing a liability of this character.

Hanson *vs.* Davison, 73 Minn., 454, 461.
Re Martin's Estate, 56 Minn., 420, 422, 423.
Patterson *vs.* Stewart, 41 Minn., 84, 91.
Winnebago Paper Mills *vs.* Northwestern Printing & Publishing Co., 61 Minn., 373, 376.
National New Haven Bank *vs.* Northwestern Guaranty Loan Co., 61 Minn., 375, 392.
Pollard *vs.* Bailey, 20 Wall., 520.

Terry *vs.* Tubman, 92 U. S., 156, 161.
Carrol *vs.* Green, 92 U. S., 509, 512.
Godfrey *vs.* Terry, 97 U. S., 171, 176, 177.
Terry *vs.* Little, 101 U. S., 216.
Flash *vs.* Conn, 109 U. S., 371, 380.
Finney *vs.* Guy, 189 U. S., 335, 340, 341.
Umsted *vs.* Buskirk, 17 Ohio St., 113.
Harris *vs.* First Parish in Dorchester, 23 Pick., 112.
Jones *vs.* Jarman, 34 Ark., 323, 339, 346.
Coleman *vs.* White, 14 Wis., 700.

The mere fact that the change in the liability was made under the guise of a change in the remedy does not justify it. The remedy existing at the time when a contract is entered into constitutes a material part of the contract.

Green *vs.* Biddle, 8 Wheat., 1, 76.
Bronson *vs.* Kinzie, 1 How., 311, 319.
McCracken *vs.* Hayward, 2 How., 608, 612.
Lessee of Gantly *vs.* Ewing, 3 How., 707, 717.
Von Hoffman *vs.* Quincy, 4 Wall., 535, 550, 552.
Gunn *vs.* Barry, 15 Wall., 610.
Walker *vs.* Whitehead, 16 Wall., 316.
Edwards *vs.* Kearzey, 96 U. S., 595.
Brine *vs.* Insurance Co., 96 U. S., 627, 637.
Seibert *vs.* Lewis, 122 U. S., 284, 294.
Barnitz *vs.* Beverly, 163 U. S., 118, 122.

A contract may be just as effectually impaired by changing the remedy as by expressly creating a new contract, and such impairment is equally within the constitutional prohibition.

Green *vs.* Biddle, 8 Wheat., 1, 84.
Bronson *vs.* Kinzie, 1 How., 311, 316-318.
McCracken *vs.* Hayward, 2 How., 608, 612-614.
Lessee of Gantly *vs.* Ewing, 3 How., 707.
Planters' Bank *vs.* Sharp, 6 How., 301, 330, 332.
Howard *vs.* Bugbee, 24 How., 461.
Von Hoffman *vs.* Quincy, 4 Wall., 535, 552-554.

Gunn *vs.* Barry, 15 Wall., 610.
Walker *vs.* Whitehead, 16 Wall., 314.
Edwards vs. Kearzey, 96 U. S., 595.
Brine *vs.* Insurance Co., 96 U. S., 627, 637.
Louisiana *vs.* Pillsbury, 105 U. S., 278.
Seibert *vs.* Lewis, 122 U. S., 284.
McGahey *vs.* Virginia, 135 U. S., 662, 693.
Barnitz *vs.* Beverly, 163 U. S., 118.

The foregoing decisions deal chiefly with legislation impairing the rights of creditors, but the same considerations apply to the rights of both parties under the contract. The Constitution protects equally the debtor and the creditor, the stockholder and the billholder.

As was said in

State National Bank *vs.* Sayward, 91 Fed., 443,

> "Somewhat anomalous and arbitrary remedies, like that existing in the constitution and statutes of the State of Kansas, have been upheld and enforced in the Federal Courts, largely *upon the ground that the stockholder submitted himself to the operation of the remedy and contracted with the public in respect to it. It could perhaps be said with consistency that creditors, on the other hand, who dealt with the corporation and voluntarily contract, are bound by the disabilities and conditions prescribed by the government creating the corporation;* and Railway Co. *v.* Gebhard, 109 U. S., 527-537, would seem to justify the position that creditors and members of the public who deal with a corporation are bound by the remedy and the liability prescribed, together with the disabilities, if any, under the laws of the State creating the corporation and prescribing the remedy. The doctrine of Railway Co. *v.* Gebhard, *supra*, which is applied to foreign creditors, must be accepted as fairly applying to home creditors, like the plaintiff in this case, who, it must be held, presumed upon the reasonable scope of the local right and the local remedy. If, therefore, the question is the lack of efficiency in the remedy prescribed by the Statute of Ohio * * * it would seem, upon reason, that *the rule which would hold the stockholder to an arbitrary and anomalous remedy, on the ground of contract, should hold the creditor to an insufficient and practically inoperative remedy upon the same ground.*"

These principles have been repeatedly applied to statutes changing the contracts of stockholders. The following decisions are authorities in favor of the contention of these defendants:

Dexter *vs.* Edmands, 89 Fed., 467.
State National Bank *vs.* Sayward, 91 Fed., 443.
Western National Bank *vs.* Reckless, 96 Fed., 70, 78.
Evans *vs.* Nellis, 101 Fed., 920; affirmed, 187 U. S., 271, without passing on the constitutional questions.
Webster *vs.* Bowers, 104 Fed., 627.
Knickerbocker Trust Co. *vs.* Myers, 133 Fed., 765; affirmed,
Myers *vs.* Knickerbocker Trust Co., 139 Fed., 111, 117.
Knickerbocker Trust Co. *vs.* Cremen, 140 Fed., 973.
Harrison *vs.* Remington Paper Co., 140 Fed., 385.
Converse vs. Aetna National Bank, 64 At., 341.
Converse *vs.* Stewart, 105 N. Y. App. Div., 478.

It is sometimes said that the remedy may be changed at will, and *dicta* to that effect are to be found in many decisions, including decisions of this court. The statement, however, is too broad, as clearly appears from the authorities cited above. The true rule, it is submitted, is, that changes even in the remedy cannot be made, which substantially affect the rights of the parties; but that, if this is avoided, the *forms* or *modes* of proceeding can be altered at the will of the legislature. The distinction, in other words, is not between right and remedy, but between substance and form. The legislature can make changes in the form of proceeding; but it cannot make any change, whether in the remedy or in any other feature of the contract, which detrimentally affects either party to the contract.

Bronson *vs.* Kinzie, 1 How., 311, 318.
Von Hoffman *vs.* Quincy, 4 Wall., 535, 554.

Tennessee *vs.* Sneed, 96 U. S., 69, 74.
Edwards *vs.* Kearzey, 96 U. S., 596, 603, 604.
Brine *vs.* Insurance Co., 96 U. S., 627, 637.
Allis *vs.* Insurance Co., 97 U. S., 144, 146.
Louisiana *vs.* New Orleans, 102 U. S., 203, 206, 207.
Penniman's Case, 103 U. S., 714, 720.
Antoni *vs.* Greenhow, 107 U. S., 769, 774.
Connecticut Mutual Life Ins. Co. *vs.* Cushman, 108 U. S., 51, 62, 63.
Virginia Coupon Cases, 114 U. S., 269, 298-300.
Fourth National Bank *vs.* Francklyn, 120 U. S., 747, 755.
Seibert vs. Lewis, 122 U. S., 284, 297, 299.
Swinburne *vs.* Mills, 17 Wash., 611, 616-622.
Second Ward Savings Bank *vs.* Schranck, 97 Wis., 250, 261-266.

The changes in remedy which have been sustained are, it is believed, confined to changes in form, which did not affect the substance.

Terry *vs.* Anderson, 95 U. S., 628, 633.
Tennessee *vs.* Sneed, 96 U. S., 69, 74.
Louisiana *vs.* New Orleans, 102 U. S., 203, 206, 207.
Penniman's Case, 103 U. S., 714, 720.
Fourth National Bank *vs.* Francklyn, 120 U. S., 747, 755.
Hill *vs.* Merchants' Ins. Co., 134 U. S., 515.
Oshkosh Waterworks Co. *vs.* Oshkosh, 187 U. S., 437, 439, 444.

Certain other decisions of this court, which have been cited in support of the proposition that the remedy may be changed at will, do not, it is submitted, support that proposition.

In *Ewell vs. Daggs*, 108 U. S., 143, the repeal of a law forfeiting the interest of a loan for usury was upheld, on the ground that the law repealed was a penal law embodying a

rule of public policy which was entirely extrinsic to the contract, and consequently did not enter into it in any way.

The same reasoning underlies the decision in *Campbell vs. Holt*, 115 U. S., 620, where it was held that a statute of limitations does not enter into the contract, and can be altered. The strong dissenting opinion by Justices Bradley and Harlan points out that this case goes to the very extreme of permissible changes.

In *City and Lake R. R. Co. vs. New Orleans*, 157 U. S., 219, an act was sustained which permitted a municipality to enforce by *mandamus* contracts made with it by corporations for public improvements. The decision went largely on the ground that it was consonant with public policy to give a new mode of enforcing a public duty.

In *League vs. Texas*, 184 U. S., 156, 158, a statute changing the method of collecting taxes due the State was held not to impair the obligation of contracts, on the ground that the relation between the State and the taxpayer is not a contractual relation at all.

In *Waggoner vs. Flack*, 188 U. S., 595, the Court sustained an act permitting the forfeiture of public lands for non-payment of interest on a note given for the purchase price. The court held that the State had not contracted to limit itself to any particular remedy for the default. While the opinion contains some *dicta* to the effect that the remedy may be changed, it is submitted that the real ground of the decision is the rule, laid down in *Dollar Savings Bank vs. U. S.*, 19 Wall., 227, 239, that a statute providing for a particular remedy between a State and its citizens does not constitute a contract that no other remedy shall be provided or used; and, therefore, as in *League vs. Texas, supra*, no contractual right was impaired.

The changes which have been sustained fall within one or the other of these classes:

1. Changes in the *form* of the remedy, which do not substantially affect the relations between the parties.

2. Changes in general rules of public policy which are extrinsic to the contract, and do not enter into it.

3. Changes in the remedy of the State, or one of its subdivisions, against its citizens, which do not impair any contract, because the relationship between the State and its citizens is not a contractual one.

In the case at bar, the change is a vital change in the relationship of the parties to the contract, and cannot, it is submitted, be sustained as a mere change in the form of the remedy.

(6) THE DEPRIVATION OF THE RIGHT TO BE HEARD AS TO THE CLAIMS OF CREDITORS, AND OF VESTED DEFENSES TO SUCH CLAIMS.

In permitting the indebtedness of the corporation to be fixed without making the stockholders parties, the statute deprives them of the opportunity of testing or questioning any claim against the corporation that may be presented, or having it determined whether it is a claim of such a nature as to make the stockholders liable for it.

There is another serious infringement on the rights of stockholders: the stockholders, who are liable directly to creditors for debts of the corporation, may have many defenses against claims, which, for one reason or another, may not be available to the corporation itself—for example, *ultra vires*, the statute of limitations, release to stockholders and many others that will readily come to mind. Such a defense, assuming it to be pleadable by the corporation, in any given case, the corporation may have waived, or may be estopped from asserting, without thereby binding the stockholders individually, yet by the new statute stockholders are made liable indiscriminately for all claims which may be allowed, in their absence, against the corporation, in the assignment or receivership proceedings.

The vested right of stockholders to contest the claims of creditors under the former statute is well recognized. The proceedings, as has already been pointed out, were in the nature of a suit in equity, to which all creditors and all stockholders were parties from the beginning. Any claim asserted by any creditor could be contested by any party to the suit, and particularly by any stockholder.

In *National German American Bank vs. St. Anthony, etc., Co.*, 61 Minn., 359, it was held that the proper practice in an action under Chapter 76 was to bring stockholders in as parties defendant at the start; but if plaintiff failed to do so, any other creditor might come in and file a complaint and have the stockholders brought in as parties defendant.

In *Pioneer Fuel Co. vs. St. Peter Street Improvement Company*, 64 Minn., 386, it was held that in an action under Chapter 76 the stockholders made defendants must plead to the complaint, but need not plead to the claim of each creditor, and said, regarding the claims of creditors, at page 388:

> "These petitions or proofs of claim are *sui generis;* and it is not necessary for the defendant stockholders, or any other party to the action, to answer or reply to them, but they stand denied by all parties, and must be proved on the trial, unless expressly admitted."

In *Oswald vs. Minneapolis Times Co.*, 65 Minn., 249, the claims of creditors were contested by a defendant stockholder.

In *Palmer vs. Bank of Zumbrota*, 72 Minn., 266, it was held that judgment should be rendered only in favor of those creditors who have proved their claim in the proceedings against stockholders.

In *Helm vs. Smith-Fee Co.*, 76 Minn., 328, 331, it was held that in an action under Chapter 76 each creditor's claim is deemed to be controverted and he must prove his claim.

See also,

Chesnut *vs.* Pennell, 92 Ill., 55.

In the case at bar, no notice was given of any hearing on claims, excepting by publishing a notice directed to creditors only, and it does not appear that any stockholder was heard regarding the claims of creditors. Most of the claims allowed by the court were for debts created more than six years before the assessment proceedings, and it may be that if the stockholders had been heard, they might have successfully pleaded the statute of limitations as a defense to the greater portion of this indebtedness.

(7) THE CHANGE FROM A LIABILITY OWING TO THE CREDITORS TO A LIABILITY OWING TO A RECEIVER.

It is well settled that the double liability of stockholders is a liability to the creditors, and not to the corporation. It follows, and it had repeatedly been held before the Statute of 1899, that the liability is not an asset of the corporation, and cannot be enforced by a receiver.

In re People's Live Stock Insurance Co., 56 Minn., 180, 185.
Palmer *vs.* Bank of Zumbrota, 65 Minn., 90, 98.
Minneapolis Baseball Co. *vs.* City Bank, 66 Minn,. 441, 445, 446.
Richardson *vs.* Merritt, 74 Minn., 354, 362.
Hale *vs.* Allinson, 188 U. S., 56, 67.

See also,

Converse *vs.* Aetna National Bank, 64 At., 341, 344.

This liability the new statute assumes to take from the creditors and to give to a receiver, not of the creditors, but of the corporation. In so doing, it impairs the rights of both creditors and stockholders.

To sum up the vital changes which the new statute assumes to make in the contract: It changes the entire nature of the liability from a liability to all the creditors generally, enforceable only in an action in equity at the corporate domicile with all stockholders and creditors as parties, to a liability which can, as to non-resident stockholders, be fixed by proceedings to which they are not parties, and of which they have received no notice, and permits the liability so fixed to be enforced by an action against any one stockholder by a receiver in a court of law at the domicile of the stockholder. It changes the liability of stockholders from a liability to creditors for the deficiency in corporate assets for the payment of debts, and substitutes a liability to a receiver of the corporation for all claims against the corporation, whether

debts or otherwise, for all the costs and expenses of the receivership, and for the commissions of the receiver; and not content with this, it adds an additional liability for an estimated probable indebtedness, for estimated probable insolvencies of other stockholders, and for estimated probable expenses of collecting the assessment against solvent stockholders—in short, it leaves the entire question of the amount to be paid by stockholders not subject, as heretofore, to a fixed legal criterion, but subject only to the arbitrary discretion of the court. It deprives stockholders of the right heretofore vested in them to contest the claims of crediors, and to require their judicial establishment as against stockholders, and deprives them of vested defenses to such claims, and subjects them to all claims which may be made against the corporation, whether incurred during the life of the corporation or after its practical dissolution, and whether or not they would, under the former statute, have been claims for which the stockholders were liable.

It is believed that changes so radical as these have never been sustained by any court.

II.

The Act of 1899 deprives stockholders of property without due process of law, by authorizing a conclusive judgment against non-resident stockholders who have not been served with process.

The only notice to stockholders provided for by the act is that on the petition being filed the Court "shall direct such notice of such hearing to be given by the party presenting said petition, *by publication or otherwise,* as the Court in its discretion may deem proper" (Section 2). The act provides, "Said order and the assessment thereby levied shall be *conclusive* upon and against all parties liable upon or on account of any stock or shares of said corporation, *whether*

appearing or represented at said hearing or having notice thereof or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment" (Section 5). Section 6 provides that it shall be the duty of the assignee or receiver to bring an action against every stockholder for the amount so assessed against him.

In the case at bar, it is conceded that the defendants were not parties to the assessment proceedings, and had no knowledge in fact of them (Record, p. 41). They contend that the statute, permitting a conclusive assessment against them without service of process upon them, deprives them of their property without due process of law.

That due process of law requires personal service of process, or a voluntary appearance, is so well settled as not to admit of discussion.

> Mason *vs.* Eldred, 6 Wall., 231, 239.
> Pennoyer *vs.* Neff, 95 U. S., 714, 733, 734.
> Haddock *vs.* Haddock, 201 U. S., 562, 567.
> Clark *vs.* Wells, 203 U. S., 164, 170.

The plaintiff's claim is that the stockholders were "in law represented by said Minnesota Thresher Manufacturing Company in said proceedings."

Starting with the settled proposition that personal service is necessary to constitute due process of law, unless it has been waived, the plaintiff's contention can be supported only by finding that the defendants, or their testators, have waived personal service, and have consented to be represented by the corporation in assessment proceedings. Such waiver and consent implies some voluntary act on the part of the stockholder. It appears that all that the defendants or their testators ever had to do with the corporation was to exchange their preferred stock in the Northwestern Manufacturing and Car Company for common stock in the Minnesota Thresher Manufacturing Company, in the year 1885. If there has been any waiver or consent, it must, therefore, be found in connection with the act of subscribing to the shares of stock.

Whether the subscription to shares in a Minnesota corporation involved an authorization to the corporation to rep-

resent the stockholder in assessment proceedings, and a waiver of notice of such proceedings, obviously depends on the law of Minnesota at the time of the subscription. Both the Minnesota Supreme Court and this court have held that stockholders not parties to the proceedings were not bound by them.

> Commercial Bank of St. Paul *vs.* Azotine Mfg. Co., 66 Minn., 413, 416.
> Hale *vs.* Allinson, 188 U. S., 56, 80, 81.

The holding, that stockholders not parties are for that reason not bound, necessarily involves a holding that they have not waived their right to notice of the proceeding against them. If the non-resident stockholders in the cases cited were not represented by the corporation, on what principle can it be argued that stockholders in other corporations are so represented?

It will hardly be contended seriously that the act of 1899, to which the stockholders did not assent, operated as a waiver of their right to notice. If they ever waived that right they did so in 1885, when they took stock, and that they did not do so is established by the cases cited.

That holding is sound on principle, and conforms to the rule prevailing generally with regard to the relation between a corporation and its shareholders. The stockholder, by becoming such, impliedly authorizes the corporation to represent his interests in the conduct of the corporate affairs.

> Holland *vs.* Duluth Iron Mining & Development Co., 65 Minn., 324, 331.

Obviously, he does not authorize the corporation to represent him as to matters that are not part of the corporate business. The double liability of stockholders is such a matter. As this court clearly and succinctly expressed it, after reviewing the Minnesota decisions:

> "That was a contract in behalf of the creditor, *with which the corporation had nothing to do.*"
>
> Hale *vs.* Allinson, 188 U. S., 56, 67.

How, then, could the corporation represent the stockholders with regard to it? Clearly, as to liabilities such as this, to which the corporation is not a party and which are not assets of the corporation, it has no implied authority to represent the stockholders, any more than it would have implied authority to represent the endorsers on its corporate notes.

Willius *vs.* Mann, 91 Minn., 494.
Andrews *vs.* National Foundry & Pipe Works, 76 Fed., 155, 172.
Converse *vs.* Aetna National Bank, 64 At., 341, 344, 345.
Converse *vs.* Stewart, 105 N. Y., App. Div., 478.
Stephens *vs.* Fox, 83 N. Y., 313, 317.
Great Western Telegraph Co. *vs.* Barker, 56 Ill. App., 402, affirmed, 166 Ill., 150.

The Supreme Court of Minnesota, in holding, contrary to the earlier decisions of the same court, cited above, that the corporation represents the stockholders in the assessment proceedings, relies upon a number of decisions, none of which, it is submitted, support the conclusion.

Straw & Ellsworth Mfg. Co. *vs.* Kilbourne Boot & Shoe Co., 80 Minn., 125.

The cases relied on by that court fall naturally into the following classes:

1. The stock subscription cases.

Sanger *vs.* Upton, 91 U. S., 56.
Hawkins *vs.* Glenn, 131 U. S., 319.
Great Western Telegraph Co. *vs.* Purdy, 162 U. S., 329.
Hamilton *vs.* Glenn, 85 Va., 901.
Glenn *vs.* Williams, 60 Md., 93.

These cases hold that in winding up proceedings, a court of equity may make, or direct the receiver to make, a call or assessment, for the amount remaining due on stock subscriptions, or a portion thereof, without notice to stockhold-

ers. These cases go on the ground that the stockholder has agreed to pay the money to the corporation whenever the directors call for it; the directors could make such call at any time without notice to the stockholder; and when the corporation becomes insolvent, the court takes the place of the directors, and may do what the directors could have done with reference to this corporate asset, viz., make a call or demand for it without notice to the stockholder.

See the reasons for the rule, stated in

Hawkins *vs.* Glenn, 131 U. S., 319, 329.
Great Western Telegraph Co. *vs.* Purdy, 162 U. S., 329, 336.
Great Western Telegraph Co. *vs.* Gray, 122 Ill., 630, 640.

2. The premium note cases.

Langworthy *vs.* Garding, 74 Minn., 325, and other cases.

These decisions rest on exactly the same footing as the stock subscription cases. The makers of the notes had executed their obligations to the corporation, agreeing that the corporation might demand payment at any time. When the corporation became insolvent, the court could exercise the corporate function of making the demand or call. It was not stipulated that the corporation should hear the makers before making the call, and the court, in collecting this corporate asset, simply took the place of the corporation.

3. Cases where the statute imposing the liability also provided that an assessment upon it might be made in winding up proceedings without notice.

Howarth *vs.* Lombard, 175 Mass., 570.
Sheafe *vs.* Larimer, 79 Fed., 921.
Howarth *vs.* Ellwanger, 86 Fed., 54.
Howarth *vs.* Angle, 39 App. Div., 151; 162 N. Y., 179.
Hancock Nat. Bank *vs.* Farnum, 176 U. S., 640.

In each of these cases, the statute in force at the time of the stock subscription provided for an assessment in winding up proceedings, without notice to stockholders. By subscribing to stock, the stockholders contracted with reference to the statute, and assented to its provisions. They thereby waived their right to notice, and consented that their liability should be administered as a corporate asset.

4. The National bank cases.

Kennedy *vs.* Gibson, 8 Wall., 498.

This case, and the cases following it, simply construe the provisions of the National bank act, in the light of the policy of Congress relating to National banks, and hold that the statute permits an assessment by the Comptroller of the Currency without notice to the stockholders. To these provisions of the statute all persons taking stock in National banks are deemed to assent; and those cases stand on the same footing as the third class of cases cited.

In all of these cases, there are present two salient features which are absent in the case at bar:

a. The liability is either in its nature a corporate asset, or the stockholders have agreed that it be administered as a corporate asset.

b. The stockholders have assented that a call or assessment be made without notice to them.

In the present case, the stockholders have never consented to anything but the liability as it existed when they took their stock; and this, as has been abundantly shown, was a liability to the creditors, and never in any sense a corporate asset, and was enforceable only in an equity action to which all stockholders were parties, and did not bind any stockholder who was not a party.

Realizing the importance of this distinction between the stockholders' liability to creditors on the one hand, and corporate assets like unpaid stock subscriptions and premium

notes on the other, the Minnesota court, at this late day, endeavors to do away with the distinction altogether (80 Minn., pp. 134, 135), and cites as authority for its position a *dictum* in *Hanson vs. Davison*, 73 Minn., 454, 462.

In relying on this *dictum*, the court apparently overlooked the fact, pointed out by this court in *Hale vs. Allinson*, 188 U. S., 56, 64, that the *dictum* was inconsistent with the actual decision in *Minneapolis Baseball Co. vs. City Bank*, 66 Minn., 441, and cannot be regarded as overruling the prior cases. Those cases hold squarely that the double liability is in no sense a corporate asset, and is not governed by the principles applicable to stock subscriptions, premium notes, and other assets of the corporation.

In re People's Live Stock Insurance Co., 56 Minn., 180, 185.
Palmer *vs.* Bank of Zumbrota, 65 Minn., 90, 98.
Minneapolis Baseball Co. *vs.* City Bank, 66 Minn., 441, 445, 446.
Richardson *vs.* Merritt, 74 Minn., 354, 362.
Hale *vs.* Allinson, 188 U. S., 56, 67.

The authorities cited by the Minnesota court do not support its view, that the corporation was authorized to represent the stockholders in the assessment proceedings.

It should be borne in mind that at the time of those proceedings, when the corporation is claimed to have represented the stockholders, this corporation had, for all practical purposes, ceased to exist. There had been no meeting of stockholders of the company since June 22, 1892, and the last meeting of the directors had been held June 29, 1901 (Record, p. 52). Since December 14, 1900, the company had been in the custody of a Federal Court receiver, appointed in a suit to foreclose a mortgage covering all its property and franchises. On July 12, 1901, a sale of all the company's property and franchises under foreclosure had been confirmed by the court (pp. 72, 73). On August 15, 1901, when the sequestration action was begun, the company had not only ceased to do any business, but had been stripped of all its property and franchises. It was, therefore, no longer capable of representing its stockholders or any one else.

It is the recognized rule that a defunct corporation like this can no longer represent its stockholders, even as to the corporate affairs and assets.

Danforth *vs.* National Chemical Co., 68 Minn., 308.
Schrader *vs.* Manufacturers' National Bank, 133 U. S., 67, 76, 77.
Covell *vs.* Fowler, 144 Fed., 535, 538, 539.

Nor did the corporation in fact make any pretense of representing the stockholders. It did not appear in the assessment proceedings. The summons and complaint in the sequestration action were served on Mr. Buffington and handed by him to Mr. McBeath, as above described, and on the following day Mr. McBeath appeared in court, and in the name of the company consented, so far as appears, to the appointment of a receiver. In none of the subsequent proceedings is any appearance by the company noted. The order of assessment was made after hearing counsel for the receiver on the one hand, and counsel for certain stockholders, but there was no appearance for the corporation which is now claimed to have represented the stockholders (p. 66).

No appearance by the corporation appears to have been contemplated by the statute of 1899. Section 2 provides for "such notice * * * by publication or otherwise, as the Court, in its discretion, may deem proper." Section 3 directs the court at the hearing to consider such proofs as may be offered "by the assignee or receiver, or by any creditor or officer or stockholder of said corporation who may appear in person or by attorney." No provision is made for hearing the corporation. The statute recognizes that by the time of the hearing the corporation is likely to be defunct, and that the contesting parties will be the receiver or the creditors on the one hand, and the officers or stockholders on the other.

It is submitted that the framers of the statute never contemplated any appearance by the corporation as representing the stockholders. What they supposed was, that the notice provided for in Section 2 would be sufficient to bind the stockholders. The Minnesota Supreme Court, doubtless realizing that notice "by publication or otherwise" does not

constitute due process of law, resorted to the theory of representation by the corporation, in order to sustain the statute,—a theory which, it is submitted, is not in accord with the law or the fact.

To sum up: Stockholders in corporations are, no less than all other citizens, protected against deprivation of their property without due process of law, which, in proceedings against them, requires personal service of process. Like all other defendants, they may waive that requirement, and consent to an assessment without notice; but in the absence of such waiver, they cannot be bound by an assessment without notice, however convenient such a mode of procedure may appear to be. In the case at bar, it is unquestioned that before the statute of 1899, the defendants were entitled to a hearing, and that statute could not deprive them of that right without their consent. As they never assented to its provisions, it follows that as to them it is a nullity. Nor could they be represented by the corporation with regard to a liability with which the corportaion had nothing to do, and as to which they never agreed that it should represent them; especially where the corporation had practically ceased to exist, and did not pretend to represent them, and the statute did not contemplate that it should.

III.

The Minnesota court was without jurisdiction to make the order of assessment.

These actions were brought upon the assessment order, as on a judicial determination binding upon the defendants. The question arises, whether the District Court of Washington County, Minnesota, had jurisdiction to make that determination. That is always a proper subject of inquiry, for if that court acted without jurisdiction, its determination is a nullity, and no recovery can be based on it.

Williamson *vs.* Berry, 8 How., 495, 540.
Thompson *vs.* Whitman, 18 Wall., 457, 468.
Old Wayne Life Assn. *vs.* McDonough, 204 U. S., 8, 15-17.

These defendants contend that even assuming the statute of 1899 to be constitutionally valid, the Minnesota court failed to comply with the requirements of the statute, and was without jurisdiction of the subject matter, and without jurisdiction of the persons of the defendants.

3. THE DISTRICT COURT OF WASHINGTON COUNTY, MINNESOTA, HAD NO JURISDICTION OF THE SUBJECT MATTER, BECAUSE NO STATE OF FACTS EXISTED UNDER WHICH IT WAS AUTHORIZED TO APPOINT A RECEIVER AND MAKE AN ASSESSMENT.

The statute of 1899 authorizes the District Court to proceed in the manner therein prescribed, in certain cases. Unless one of those cases or states of fact existed, the court had no jurisdiction to proceed.

Thatcher *vs.* Powell, 6 Wheat., 119, 127.
East Tennessee, Va. & Ga. R. R. Co. *vs.* Southern Telegraph Co., 112 U. S., 306, 310.
Griffith *vs.* Frazier, 8 Cranch, 9, 23.
Hatch *vs.* Ferguson, 68 Fed., 43, 45.
Murray *vs.* American Surety Co., 70 Fed., 341, 346.

The cases in which alone the court may proceed under the statute, are thus defined in Section 1: "Whenever any corporation * * * has heretofore made or shall hereafter make an assignment for the benefit of its creditors under the insolvency laws of this State; or whenever a receiver for any such corporation has heretofore been or shall hereafter be appointed by any District Court of this State, whether under or pursuant to any of the provisions of Chapter seventy-six (76) of the General Statutes of eighteen hundred and ninety-four (1894) of Minnesota, and the acts amendatory thereof, or under or pursuant to any other statute of this State, or under the general equity powers and practice of such

court; the District Court appointing such receiver, or having jurisdiction of the matter of said assignment, may proceed as in this act provided."

The sequestration action was brought, and the appointment of the receiver was applied for, under the supposed authority of Chapter 76 of the General Statutes (p. 58). The question then is, whether a receiver was lawfully appointed under the provisions of that chapter? Those provisions are, briefly, as follows: On the return of an execution unsatisfied, the District Court, in the proper county "may sequestrate *the stock, property, things in action and effects of such corporation,* and appoint a receiver of the same" (Section 5897). Any creditor desiring to enforce the liabilities of directors, officers or stockholders may file a complaint (Sec. 5905). "The Court shall proceed thereon, as in other cases, and *when necessary* shall cause an account to be taken *of the property and debts due to and from such corporation,* and shall appoint one or more receivers." (Section 5906). If it appears that the corporation is insolvent and has *no property,* "the Court may proceed, *without appointing any receiver,* to ascertain the respective liabilities of such directors and stockholders, and enforce the same by its judgment, as in other cases." (Section 5907).

The meaning of these provisions is plain. When there is property of the corporation to be administered, the court may sequestrate it, and appoint a receiver of such property, as an incident to its administration. If, in such case, the creditors file a complaint to enforce stockholders' liabilities, that complaint can be entertained, and the corporate property administered, in one omnibus equity proceeding, to which all creditors and all stockholders are parties. But if there is no corporate property, no receiver is to be appointed; for, as has been seen, the stockholders' liability is not a corporate asset. The Minnesota Supreme Court has accordingly decided that where there are no corporate assets, it is not a case for the appointment of a receiver.

International Trust Co. *vs.* American Loan & Trust Co., 62 Minn., 501.

That was exactly the case here. The corporation had been stripped of all its property and franchises. The complaint in the sequestration action alleged that the corporation had no property whatever (p. 49); and thereby showed on its face that there was no case for the appointment of a receiver.

Inasmuch, then, as the case was not one in which a receiver could be appointed, the court had no jurisdiction to take the proceeding which the statute of 1899 authorized only in a case where a receiver was appointed under authority of law. It follows that the assessment order was void for want of jurisdiction.

B. THE DISTRICT COURT OF WASHINGTON COUNTY, MINNESOTA, HAD NO JURISDICTION OF THE PERSONS OF THE DEFENDANTS, BECAUSE IT FAILED TO GIVE THEM THE NOTICE REQUIRED BY THE STATUTE.

The statute of 1899 requires the giving of "such notice of such hearing to be given by publication or otherwise, as the Court in its discretion may deem proper." Assuming for the moment, that compliance with this requirement would constitute due process of law, the burden of proof was upon plaintiff to show such compliance; in default of which he has failed to show jurisdiction over the persons of the defendants, and the assessment order is a nullity.

Galpin *vs.* Page, 18 Wall., 350.
Windsor *vs.* McVeigh, 93 U. S., 274, 283, 284.
Old Wayne Life Ass'n *vs.* McDonough, 204 U. S., 8, 18.

It was, therefore, incumbent upon the plaintiff to show what direction, if any, the District Court made for the giving of notice of the hearing to the persons who were entitled to be heard,—viz., the creditors, officers and stockholders (Section 3)—and that those directions had been complied with.

No such showing was made. On the contrary, the record shows affirmatively that the requirements of the statute were not complied with. The only reference to any attempt at giving notice to any stockholder is the recital in the assessment order, that some order had been made by the Court on April

16, 1902, the terms of which are not stated, and "that copies of said order dated April 16, 1902, were duly published, mailed and served in the manner therein prescribed, and that due notice of said hearing was duly given by said receiver to the defendant and to each stockholder of record of the defendant, as directed by said order" (p. 66).

What notice this order directed to be given, nor whether in fact those directions were carried out, does not appear. Under the authorities cited above, it was incumbent on the plaintiff to prove these facts, it being admitted that jurisdiction was not acquired by personal service.

It does appear, however, that no notice whatever was directed or given to stockholders until *after* the hearing at which the claims of creditors had been heard and allowed. By order of September 3, 1901 (p. 56), a notice was published *directed to creditors only*, and not to stockholders (p. 57), requiring them to prove their claims, pursuant to the provisions of Section 5911 of Chapter 76 of the General Laws of 1894. It was not until *after the hearing on and allowance of claims* that the receiver filed his petition on April 16, 1902, on which an order was then made by the Court directing notice to stockholders of an application for an order assessing them to pay those claims. But when that notice—whatever it was—was given, the claims had already been established, and all that remained to be determined was the amount of the assessment required to pay them.

This is not the notice contemplated by the statute. As has been shown above, stockholders were, under the former law, entitled to be heard as to the claims of creditors, before they were allowed.

National German-American Bank *vs.* St. Anthony, &c., Co., 61 Minn., 359.
Pioneer Fuel Co. *vs.* St. Peter Street Improvement Co., 64 Minn., 386, 388.
Oswald *vs.* Minneapolis Times Co., 65 Minn., 249.
Palmer *vs.* Bank of Zumbrota, 72 Minn., 266.
Helen *vs.* Smith Fee Co., 76 Minn., 328, 331.

This rule the new statute assumed to change, in so far as it substituted notice by publication or otherwise for the per-

sonal service formerly required. It did not change the rule that whatever notice was given must be given *before the hearing on claims.* It requires "*notice of such hearing*" (Section 2). Of what hearing? Of the hearing at which the Court is required to hear the receiver, and any creditor, officer *or stockholder,* as to *the indebtedness,* the expenses, the assets, the liabilities of stockholders and the necessity for and amount of an assessment.

Straw & Ellsworth Mfg. Co. *vs.* Kilbourne Boot & Shoe Co., 80 Minn., 125, 138.
London, &c., Mortgage Co. *vs.* St. Paul, &c., Co., 84 Minn., 144, 146.

In the case last cited, a proceeding under the Statute of 1899, the hearing on claims of creditors and the hearing on the question of assessing stockholders, were held together, and stockholders were heard on all questions arising, and were allowed to control the claims of creditors.

How vain and ineffectual is such a notice as was given in the case at bar,—after the amount of the indebtedness had been fixed, when there remained nothing to contest. This proceeding, it is submitted, was had in disregard of the plain requirements of the statute, and the order was without jurisdiction and void.

Thus far, it has been shown, that no sufficient notice was given to stockholders. Apart from and in addition to this objection, stands the objection that *no notice whatever was given to these defendants.* This is an admitted fact (pp. 41, 101). The only notices which appear ever to have been sent with reference to their stock were notices, given *after the making of the assessment order* (p. 67), and were mailed addressed to the defendants' testators, both of whom were dead (p. 101). Such a notice, whenever sent, could not operate as notice to these defendants.

However liberal the provisions of the Statute of 1899 on the subject of notice, it did require *some* notice to the defendants, and *no* notice was given them. Consequently, the Court never acquired jurisdiction over them to make an assessment.

To sum up the objections to the jurisdiction of the Court:

1. In the absence of corporate property of which a receiver could be appointed, the case was not one in which a receiver could be appointed, and the Court had no authority to proceed under the Statute of 1899.

2. The record is bare of any proof of notice to stockholders.

3. If any notice was given to stockholders, it was given after, and not before, the hearing on the claims of creditors.

4. No notice whatever was given to these defendants.

It follows that the District Court of Washington County, Minnesota, in making the assessment order, acted without jurisdiction of the subject matter, or of the persons of the defendants, and that the assessment order is a nullity, and cannot be the basis of a recovery against the defendants.

IV.

The plaintiff as receiver has no such title as can give him the right to maintain this action.

It is now so decisively settled by the decisions of this Court that a receiver cannot, by virtue of the authority conferred upon him by his appointment, maintain an action in the federal courts in any jurisdiction other than that in which he was appointed, that argument or discussion on the point is needless.

Booth *vs.* Clark, 17 How., 322.
Hale *vs.* Allinson, 188 U. S., 56.
Great Western Mining Co. *vs.* Harris, 198 U. S., 561.

Only two exceptions to this rule are recognized:

1. Where the receiver has title to the cause of action. This is not a real exception, but only an apparent one, because in

such a case he sues, not as receiver at all, but as the owner of the property or the chose in action which is the subject matter of the litigation.

Relfe *vs.* Rundle, 103 U. S., 222, 225.
Great Western Mining Co. *vs.* Harris, 198 U. S., 561, 576, 577.

2. Where the stockholders have contracted with reference to an existing statute authorizing an assessment to be sued upon by a receiver whether having title or not, and have thereby agreed to respond to a suit brought by a receiver. In such a case, they are held to their contract, and cannot question the receiver's right to sue.

Relfe *vs.* Rundle, 103 U. S., 222, 226.
Howarth *vs.* Lombard, 175 Mass., 570, 574, 576.
Howarth *vs.* Angle, 162 N. Y., 179, 187.
Howarth *vs.* Ellwanger, 86 Fed., 54.
Fish *vs.* Smith, 73 Conn., 377, 381.
King *vs.* Cochran, 76 Vt., 141, 150.

Neither of these facts exists in the case at bar.

1. The receiver has no title. The liability was a liability of the stockholders to the creditors, not to the corporation. The receiver was the receiver, not of the creditors, but of the corporation. He could take title only to corporate assets. Concededly he acquired no rights by assignment from the creditors (p. 72).

If the Statute of 1899 assumed to give the receiver title, it could not effectuate its object, because the legislature had no power to take the rights of the creditors and transfer them to a receiver.

See Hilliker *vs.* Hale, 117 Fed., 220, 224.

But the statute did not assume to do any such thing. It provides that whenever a receiver is appointed under existing provisions of law (Section 1), the Court may make an assessment (Sections 2 and 3), and may direct the receiver to collect the assessment (Section 4), whereupon he may main-

tain actions thereon in any jurisdiction (Section 6). This does not give the receiver title. The receiver here was appointed under the provisions of Chapter 76 of the General Statutes of 1894, the same statute under which the receiver in Hale *vs.* Allinson, *supra,* was appointed. That is to say, he was a chancery receiver,—the arm of the Court. The Statute of 1899 did not change his character or his title. It made this change: in *Hale* vs. *Allinson,* the Minnesota Court had, without express statutory authority, directed its receiver to bring suit in foreign jurisdictions. The Statute of 1899 conferred upon the Court express authority to make such direction.

The order of the Court directing the receiver to bring such suits, whether it was expressly authorized by statute or not, still had no other or greater force than that of being an authorization given by the Court to its own officer. His rights depended, not on any title, but solely on the order of the Court. This fact was not altered by the statute expressly authorizing the Court to make such order.

The Minnesota Court could not make its order operative or send its representative beyond the territorial limits of the State, and the legislature of the State could not give it that power. This is the principle settled by the decisions of this Court, cited above, and they are controlling in the case at bar.

2. The defendants never agreed to respond to a receiver appointed by the Court.

The theory of the cases upon which plaintiff relies is thus concisely stated by Mr. Justice Baldwin, in

Converse *vs.* Aetna Nat. Bank, 64 At., 341, 345:

"For the purposes of this appeal, we assume (but do not decide) that the plaintiff is a proper representative of the creditors of the Minnesota Thresher Manufacturing Company; that he can maintain this action, as a statutory successor to their contractual rights against the defendant, *upon its implied promise to satisfy those rights on the demand of such a successor to them;* and that these, under the terms of the defendant's contract, could properly be worked out and defined by an order of assessment made by a Minne-

sota Court, on a creditor's bill, filed after the corporation had become wholly destitute of assets."

That the defendants never entered into any such agreement, express or implied, has, it is believed, been so plainly demonstrated as not to require further argument.

It is submitted that the receiver had no such rights, whether by ownership or by contract, as to give him a standing to maintain these actions in a federal Court sitting in a State foreign to that of his appointment.

V.

The Minnesota Thresher Manufacturing Company was a corporation organized for the purpose of carrying on a manufacturing business and its stockholders are exempt from liability under the provisions of Section 3 of Article X of the Constitution of the State of Minnesota.

This question was so carefully considered by this Court in

> First National Bank *vs.* Converse, 200 U. S., 425,

that it will not be reargued here. The Court did not decide this question, because of the existence of a dilemma, which is thus stated in the opinion, at page 440:

"Indeed, the case arising on the record presents an obvious dilemma, which is this: If the construction of the articles of association given by the Supreme Court of the State of Minnesota, by which alone the double liability can be enforced, is accepted, then there was no liability because of *ultra vires*. If, on the other hand, we were to disregard the construction given by the Supreme Court of Minnesota to the

articles of association *we should be constrained to the conclusion that those articles but endowed the incorporators of the Thresher Company with the power to carry on a manufacturing business, and as a mere incident to acquire for the purposes of such business the property of the car company; and it would follow that there was no double liability, by force of the exception created in the constitution of Minnesota.*"

The opinion thus indicated sets forth, it is submitted, the correct construction of the articles of association. The case cited arose on demurrer. The additional facts brought out in the case at bar but strengthen the view there taken and emphasize its wisdom.

The Minnesota Thresher Manufacturing Company was organized for the sole purpose of preserving from ruin, and continuing the manufacturing business of the Northwestern Manufacturing and Car Company (pp. 29-31). The acquisition of the stock and assets of that company was merely a necessary preliminary and an incident to the continuance of the business. The new company was expressly organized pursuant to a statute relating to manufacturing corporations (p. 35). The creditors and preferred stockholders of the old company, in exchanging their claims and their stock for stock in the new company, did so in reliance on the assurance that no individual liability would be attached to a subscription, and that the stock would be full paid and non-assessable (p. 34). The certificates of stock themselves contained the statement that they were "full paid and non-assessable" (pp. 40, 72). The certificate of incorporation on its face shows, as the opinion of this Court in the case cited indicates, that the acquisition of the property of the car company was to be a mere incident to the continuance of its manufacturing business (p. 35).

Under these circumstances, were not the stockholders justified in relying on the protection given to stockholders in manufacturing corporations, by the express provisions of the Constitution of the State of Minnesota? It is clear that they never intended to assume any liability to creditors. In the absence of any judicial construction of the constitutional provision, it is submitted that the language of that provision and

of the articles of association, as well as all that was done in connection with the organization of the company, warranted the stockholders in believing that they might become stockholders in this manufacturing corporation without subjecting themselves to any additional individual liability for its debts. It is evident that they did so believe in good faith, and in reliance on that belief they made their contract.

Then, four years after the contract was made, the Supreme Court of Minnesota held that the contract did not mean what everybody had supposed it to mean; that the company was not a manufacturing corporation at all, but, as this Court has expressed it (*First National Bank vs. Converse*, 200 U. S., 425, 438), "was organized to embark in the purely speculative business of buying and selling the stock and assets of an existing and insolvent corporation, with power, but without the obligation, to engage as an independent enterprise in a manufacturing business!"

> State *vs.* Minnesota Thresher Manufacturing Co., 40 Minn., 213.

That was the first time this doctrine was laid down by the courts of Minnesota. The question not decided by this Court in *First National Bank* vs. *Converse, supra*, is, whether this Court is bound by the construction adopted by these Minnesota decisions, handed down long after the contract in suit was made.

The answer to that question is found in the repeated decisions of this Court holding that the law does not allow contracts to be changed by subsequent judicial decisions, any more than by subsequent legislation; and that where, at the time of making a contract, there has been no judicial construction of it, this Court, while leaning to an agreement with state decisions subsequently construing it, is not bound by them, but will determine for itself what the contract was.

> Burgess vs. Seligman, 107 U. S., 20, 33, 34.
>
> Brunswick Terminal Co. *vs.* National Bank, 192 U. S., 386, 396.
>
> Great Southern Hotel Co. *vs.* Jones, 193 U. S., 532, 542-548, and cases cited.

Since, therefore, this Court has already expressed its opinion that a fair construction of the articles of association in the light of the constitutional provision requires a holding that the Minnesota Thresher Manufacturing Company was a corporation organized for the purpose of carrying on a manufacturing business, and since this Court is not bound by the contrary holding of the Minnesota courts, made after the defendants took their stock, it necessarily follows that the defendants are exempt from liability to creditors of the company, by virtue of the exception contained in the Constitution of Minnesota; and that they could not be charged with any such liability, either by the state court in Minnesota, or by the federal court in New York.

VI.

The actions were barred by limitation, because not brought within two years after the defendants ceased to be stockholders in the Minnesota Thresher Manufacturing Company, within the meaning of Section 55 of the Stock Corporation Law of the State of New York.

Several different statutes of limitations were relied on at the trial as applicable to these actions (pp. 116, 117); but the provision just cited so directly covers the case that the others will not be discussed.

Section 55 of the Stock Corporation Law of New York, being Chapter 688 of the Laws of 1892, provides as follows (italics are ours):

"LIMITATION OF STOCKHOLDERS' LIABILITY.—No action shall be brought against a stockholder for any debt of the corporation until judgment therefor has been recovered against the corporation, and an execution thereon has been returned unsatisfied in whole or in part, and the amount due

on such execution shall be the amount recoverable, with costs against the stockholder. No stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, nor unless an action for its collection shall be brought against the corporation within two years after the debt becomes due; and *no action shall be brought against a stockholder after he shall have ceased to be a stockholder, for any debt of the corporation, unless brought within two years from the time he shall have ceased to be a stockholder.*"

The provision cited is a statute of limitations relating to the liability of stockholders in all stock corporations, and is applicable not only to an action against a single stockholder on a single debt, but also to liabilities of all the stockholders to contribute ratably to a deficiency.

Adams *vs.* Wallace, 82 App. Div., 117.
Adams *vs.* Slingerland, 89 App. Div., 312.
Sanford *vs.* Rhoads, 113 App. Div., 782.

The limitation is applicable to actions against stockholders in all corporations, foreign as well as domestic.

General Corporation Law of New York (Laws of 1892, Chapter 687), Section 2; Section 3, Subdivision 5; Section 33.

Platt *vs.* Wilmot, 193 U. S., 602.
Hobbs *vs.* National Bank of Commerce, 96 Fed., 396.

When did the defendants cease to be stockholders within the meaning of this statute? This is a question of local law, upon which the decisions of the state courts are controlling.

Great Western Telegraph Co. vs. Purdy, 162 U. S., 329, 339.

The question has been decisively settled in

Hollingshead vs. Woodward, 107 N. Y., 96.

In that case the court construed the very words of the statute, as used in an earlier statute relating to manufactur-

ing corporations. The court held that when a corporation ceased to do business, and went into the hands of a receiver in sequestration proceedings, its existence was practically terminated, and its stockholders ceased to be such within the meaning of the statute. This language, so construed, of course retained the same meaning when it was re-enacted as a limitation applicable to liabilities of stockholders in all stock corporations.

The Minnesota Thresher Manufacturing Company had been in the hands of a receiver in foreclosure since December 14, 1900. All its property and franchises had been sold May 25, 1901 (pp. 72, 73); and on August 15, 1901, the order was made sequestrating the property of the corporation and appointing a receiver (pp. 53-55). These actions were not commenced until January 28 and 29, 1904 (pp. 73, 122).

These actions were not brought within two years after the defendants ceased to be stockholders in the Minnesota Thresher Manufacturing Company, and they are consequently barred by limitation.

It is respectfully urged that the judgments should be reversed, and the causes remanded, with directions to render judgment in favor of the defendants.

Respectfully submitted,
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